Supreme Court, U.S.
FILED

01-1344 FEB 28 2002

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JO-BET, INC. d/b/a
HENRY THE VIII SOUTH

Petitioner,

v.

MICHIGAN LIQUOR CONTROL
COMMISSION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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16098

QUESTIONS PRESENTED FOR REVIEW

I. **Whether an agreement between a State Attorney General and a Defendant/Respondent, to resolve quasi-criminal litigation, is a "plea bargain" and whether breach of the agreement by the Attorney General, resulting in the loss of a property right, violates the due process clause of the 14th Amendment of the United States Constitution?**

II. **Whether the appellate courts of a state, vested by law with appellate and supervisory power over inferior tribunals, violated the due process and equal protection clauses of the 14th Amendment of the United States Constitution and sanctioned the unlawful taking of property, contrary to the 5th Amendment of the United States Constitution, when the appellate courts refused to act or entertain appeal or supervision to correct the actions of the inferior tribunal when that tribunal abused its discretion, acted without authority, in direct violation of state and federal law, by modifying, altering and changing a stipulated consent judgment, without consent of the parties and with total disregard of the intent of the parties, resulting in a loss of property rights?**

III. **Whether refusal of state appellate courts to follow their own rules and case law is a violation of the equal protection and due process clause of the 14th Amendment of the United States Constitution?**

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Parties to the appeal in the Michigan Supreme Court were:

Jo-Bet, Inc. d/b/a Henry the VIII South, Petitioner/Appellant.

Michigan Liquor Control Commission, Respondent/Appellee.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 29(6), Jo-Bet, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Dated: 2/28/02

Michael J. Connolly
Attorney for Petitioner

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UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The final Opinion of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal was not reported and is reprinted in the Appendix at page 1a. The Order Denying Reconsideration was not reported and appears in the Appendix at 2a. The Order of the Michigan Court of Appeals denying Application for Leave to Appeal was not reported and is reprinted in the Appendix at page 4a. The Order of the Michigan Supreme Court denying Leave to Appeal on the issue of Appeal of Right was not reported and is reprinted in the Appendix at page 5. The Order of the Court of Appeals denying a Claim of Appeal of Right was not reported and is reprinted in the Appendix at page 7a. The Order of the Wayne County Circuit Court dismissing Petitioner's Complaint for Superintending Control With Prejudice was not reported and is reprinted in the Appendix at page 8a. The Stipulated Settlement and Consent Judgment was not reported and is reprinted in the Appendix at page 12a.

STATEMENT OF JURISDICTION

The Opinion of the Michigan Supreme Court denying Application for Leave to Appeal was entered on July 30, 2001 and Motion for Reconsideration was denied November 30, 2001. Jurisdiction of this Court is invoked under 28 U.S.C. 1257, which permits review of a final judgment of the highest Court of a State by this Court upon Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution
- **5th Amendment**
- **14th Amendment**

United States Statutes
- **28 U.S.C. 1257**
- **42 U.S.C. 1983**

Federal Rules of Civil Procedure
- **Rule 60(b)**

Michigan Court Rules
- **MCR 3.302**
- **MCR 7.203**
- **MCR 7.301**
- **MCR 7.302**

Michigan Compiled Laws
- **MCL 436.17**
- **MCL 436.20**
- **MCL 436.1501**
- **MCL 436.1903**

Michigan Administrative Code
- **436.1411**

Rules of Professional Conduct
- **Cf. ABA Model Rules of Professional Conduct, Rule 3.8**
- **Michigan Rules of Professional Conduct 3.3**

STATEMENT OF THE CASE

PRE WAYNE COUNTY CIRCUIT COURT LITIGATION FACTS

Lurking in the background of the entire litigation in the state courts was the fact that Jo-Bet, Inc. was the owner and operator of an adult entertainment facility, a/k/a a topless bar. While not an expressed issue in the state court proceedings, this fact helps to place the state court actions in context. Although topless dancing, in the absence of local or state statute to the contrary, is a protected form of free speech, not all people agree with this rule of law and some people believe that this form of speech should be abolished, even some judges.

The Statement of Facts set forth hereinafter is based on the pleadings, files and records of the state courts. All pertinent documents are attached hereto in the appendix.

Jo-Bet, Inc. was incorporated in the State of Michigan in 1985.[1] From 1985 to 1991, Jo-Bet was free of alleged liquor control violations. In 1991, Southgate Police Lieutenant Lawrence Lokuta decided that Jo-Bet should be put out of business.[2] In May, 1991, Lieutenant Lokuta instigated two "sting operations" at Jo-Bet, in an effort to cause independent contractor dancers performing at Jo-Bet to commit alleged liquor control violations, namely to dance in a manner that allegedly simulated sexual conduct. As a result of these two

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1 From the early 1960's to 1985, 15480 Dix, Southgate, Michigan was a topless bar owned by another entity. In 1985, Jo-Bet acquired the prior owner's business and liquor license.

2 Lt. Lokuta, in addition to being a Southgate police officer, was also the MLCC enforcement officer.

sting operations, a liquor control violation was issued against Jo-Bet by Respondent, Michigan Liquor Contro! Commission, [hereinafter "MLCC"], alleging one count and eight incidents.

The dancers at Jo-Bet, as stated, were independent contractors. The dancers leased, from Jo-Bet, dance time and the right to perform at Jo-Bet. In the course of one month, more than 100 different dancers might perform at Jo-Bet, with each dancer performing under an alias. On any given day, 3 or 4 of the dancers might perform under the same alias, such as "Angel" or "Kristin."

On June 13, 1991, almost a month after the sting operation, Lt. Lokuta, together with a group of Southgate police officers, appeared at Jo-Bet, allegedly to serve "Jane Doe" misdemeanor warrants on the dancers that had performed in May, 1991, to charge the dancers with obscene conduct. At this time, Lt. Lokuta had no search warrant.

Lt. Lokuta and his officers surrounded Jo-Bet, blocked all of the entrances, stopped all entertainment and instructed dancers and patrons alike that they could not leave the premises. Lt. Lokuta then brought in a drug sniffing dog to check the location. No drugs were located but the dancers, staff and patrons were held for 2 ½ hours by the Southgate police and Lt. Lokuta. As a result, John Hamilton, primary stockholder of Jo-Bet, Inc. and others filed suit in the United States District Court for the Eastern District of Michigan, alleging violations of U.S.C. 1983.[3]

As a result of the dancers performing under aliases, law enforcement officials, in the event of a liquor control or other violation, had difficulty identifying the perpetrator so that corrective legal action could be taken. This was one of the

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3 After dismissal, appeal, and jury trial Lokuta was found liable for violating the civil rights of Hamilton and other patrons.

reasons that Lt. Lokuta issued the "Jane Doe" misdemeanor warrants.[4]

In March, 1992, after hearing on the alleged violations had begun, Jo-Bet, through Hamilton, negotiated a "plea bargain", wherein Jo-Bet would plead no contest to the alleged violations and would agree to construct a form wherein each dancer, performing at Jo-Bet, Inc., would sign the form listing the dancer's real name, address, social security number and stage name. In addition, the form would instruct the dancers as to prohibited acts under Michigan Liquor Control regulations. In exchange, the MLCC and the Attorney General, the legal representative of the MLCC, agreed to notify Jo-Bet[5] of the violations when they occurred so that Jo-Bet could take corrective action and, if violations were to be filed, they were to be filed promptly.

Consistent with the agreement, Jo-Bet prepared the dancers' sign in and notice form and submitted same to Lt. Lokuta, Assistant Attorney General Thomas Giachino and the MLCC for approval. The form was approved in May, 1992.

In June, 1992, only a few weeks after the plea bargain and approval of the dancer form, Lokuta again ran an

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4. Lokuta also failed to promptly act, knowing that the dancers had rapid turnover but, as would subsequently become clear, delay in notifying Jo-Bet of the infractions denied Jo-Bet a realistic opportunity to defend against any alleged liquor control violations because the delay would prohibit Jo-Bet from identifying the alleged violator and thus be unable to verify the facts or prepare a defense.

5. Or any other of the other adult entertainment facilities owned by Hamilton.

undercover sting operation at Jo-Bet. This time, he used narcotics officers from the Downriver Area of Detroit.

On June 24 and again on July 15, 1992, Lokuta and the Downriver police officers entered Jo-Bet and attempted to entice dancers to commit liquor control violations. Contrary to the March, 1992 agreement between the MLCC, the Attorney General and Lt. Lokuta. Neither Lokuta nor the Southgate police officers informed Jo-Bet of the alleged violations. In November, 1992, Lokuta caused two Southgate police officers to contact Jo-Bet to verify that Jo-Bet was maintaining the dancer information forms, but did not mention the alleged June and July liquor control violations.

In January, 1993, some 6 to 7 months after the alleged events, Lokuta again filed a liquor control complaint with the MLCC, this time alleging approximately 26 violations. Because Lokuta had not complied with the March, 1992 agreement, and because the officers made no attempt in June or July to identify the true identity of the dancers, the complaint was again filed, identifying the dancers by aliases, long after it was possible for Jo-Bet to identify the correct independent dancer or prepare a defense.

On September 14, 1993, liquor control hearings commenced on the alleged liquor control violations before Alexander Laggis, Liquor Control Commissioner. After substantial testimony, the proceedings were adjourned until a later date. At this time, Commissioner Laggis did not issue an opinion.

In May, 1994, liquor control hearings were resumed. However, Commissioner Laggis, a participant in the 1992 plea bargain and the presiding Administrative Judge during the 1993 hearings, was replaced by Administrative Law Judge Thomas A.

Van Tiem, Sr.[6]

On May 18, 1994, Judge Van Tiem concluded the hearings commenced on September 14, 1993. In June, 1994, Judge Van Tiem issued an opinion on all of the violations, including those violations heard in their entirety by Commissioner Laggis and, contrary to policy and procedure of the MLCC, ordered Jo-Bet's liquor license revoked on all material counts.

Jo-Bet, in July, 1994, timely petitioned the MLCC for a de novo hearing before the full Commission. The Commission summarily affirmed Judge Van Tiem's orders of revocation without comment.

WAYNE COUNTY CIRCUIT COURT PROCEEDINGS

Jo-Bet timely filed, pursuant to MCL 436.20[7] and MCR 3.302 (App 107a and 96a, respectively) a Complaint for Superintending Control with the Wayne County Circuit Court.(App 18a) The case was assigned to Judge Arthur Lombard. Thereafter, Jo-Bet filed a First Amended Complaint (App39a) and the case was reassigned to Judge Zahra with a new case number.

While the superintending control complaint was pending in the Wayne County Circuit Court, an offer was made to

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6. Commissioner Laggis was available to resume the hearings in 1994 but for reasons not set forth on the record, did not participate after the 1993 hearings.

7. Now MCL 436.1903 (App 114a). In 1998, MCL 436.20 was repealed and MCL 436.1903 substituted. As it relates to this litigation, the significant change was from appeal by certiorari [superintending control] to application for leave.

Hamilton to purchase Jo-Bet for $1,750,000. This possible sale was reported to Michigan Assistant Attorney General Thomas Giachino. After substantial negotiation between counsel for Jo-Bet and the MLCC and investigation by Giachino and Hamilton regarding the likelihood that a sale would be approved, an agreement, a "plea bargain", was reached between the parties. It would resolve license revocation issued against Jo-Bet and the misconduct and constitutional issues against the MLCC. It was agreed that Hamilton would sell Jo-Bet to a third party, that Jo-Bet would pay $20,000 to the MLCC for expenses related to the litigation and that the MLCC would undertake to expedite the transfer of the liquor license and permits to the new buyer. Jo-Bet, through Hamilton, was assured by Giachino, representing the Michigan Attorney General and the MLCC, that if the sale was not completed, the settlement would be vacated and the superintending control action reinstated or Jo-Bet could file a new petition for superintending control and the MLCC would not object.

On August 4, 1995, the parties entered into a Stipulation and Order of Settlement (App 12a). Pursuant to the Stipulation: (A) the case originally filed before Judge Lombard, 94-433048 CZ, was dismissed with prejudice; (B1) the Order of Revocation would be remanded to the Commission for modification to allow Jo-Bet to transfer its license; (B2) that the Commission would expedite the licensing transfer process; (B3) payment of $20,000 to the MLCC as liquidated damages and costs at transfer; (B4) that during the transfer process no violations of the Michigan Liquor Control regulations should occur and (C) that the instant case, 95-501060-AS, be **"dismissed without prejudice until the license transfer is completed."** In addition, the parties acknowledged that they entered into the agreement freely and voluntarily.

Because there was a new buyer, and therefore a new

liquor licensee, by statute, MCL 436.17[8] (App104a), the local legislative body must approve the transfer of the liquor license. The City of Southgate, at a regular meeting of the City Council, approved the transfer of the liquor license but refused to approve transfer of the entertainment permits. Without the entertainment permits, Jo-Bet was no longer a going concern and the prospective buyer had no interest in purchase.

Jo-Bet filed suit in Wayne County Circuit Court for a Writ of Mandamus to compel the City of Southgate to approve the transfer of the entertainment permit, alleging that it was attached to and part of the liquor license. This complaint was assigned to the Honorable James J. Rashid, Chief Judge. Judge Rashid held that Mandamus was not the appropriate cause of action and dismissed the complaint without prejudice.

At the same time, on or about October 10, 1996, Assistant Attorney General Thomas Giachino filed a motion with Judge Zahra for Relief from Order Entered in Case No. 95-501060-AS (App 56a). In the motion and brief, the Attorney General and the MLCC stated:

> **The parties' stipulated settlement agreement with the order contemplated that the petitioner [Hamilton] would transfer its liquor licenses and permits. Due to the order entered by Judge Rashid, the entertainment permit cannot be transferred. Thus, the order in the instant case cannot be affected. Relief from this order will allow the parties to**

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8. Now MCL 436.1501. (App110a). As to the requirement for local approval, there has been no change in the statute.

continue the appeal matter to a final resolution. (App 61a)

In addition, the Attorney General, on behalf of the MLCC, stated that: **"The substantial rights of the parties are not detrimentally affected...the present order fails to carry out the parties' intentions."** (App 62a). Because Jo-Bet had filed a Motion for Rehearing and had indicated that it was considering an appeal of Judge Rashid's decision, Judge Zahra, on January 28, 1997, denied the Attorney General's motion on the grounds that it was premature.(App 54a). Judge Zahra believed that the sale still might occur. Thereafter, Assistant Attorney General Thomas Giachino retired.

Judge Rashid denied Jo-Bet's Motion for Rehearing regarding the transfer of the entertainment permit and, after investigation, Jo-Bet decided not to proceed further with litigation to sell the bar. No other buyers were on the scene, given that the City of Southgate would not allow Jo-Bet to be sold as a going concern.

On July 30, 1997, the Attorney General, on behalf of the MLCC, filed a Motion to Dismiss the Complaint for Superintending Control With Prejudice or to Schedule Briefing and Argument. (App 51a). This time, the MLCC and the Attorney General abandoned their admissions that the agreement had intended to sell the business as a going concern and that the failure to transfer the license was not as a result of action of Jo-Bet. Instead, the Attorney General and the MLCC, wanted dismissal of the complaint for superintending control with prejudice, despite the clear wording of the Stipulation and Order of August 4, 1995 and the admissions of the Attorney General and the MLCC on October 10, 1996.

From the bench, Judge Zahra indicated that he was going to order that the complaint for superintending control be dismissed with prejudice. Without waiting for the written order, Jo-Bet filed a Motion for Relief and for Further Argument,

accompanied by the Affidavit of Terri Morency, counsel for Jo-Bet at the time of the plea bargain (App 56a and 64a). Jo-Bet attempted to take the deposition of Thomas Giachino regarding his understanding of the stipulation on August 4, 1995, but the Office of the Attorney General obtained an ex-parte stay blocking Mr. Giachino's deposition. Judge Zahra, during argument on the motion for relief, indicated that he would permit, should his decision be adverse to Jo-Bet, Giachino's deposition to be taken, but that event never occurred.

On November 18, 1997, Judge Zahra issued a written opinion and order dismissing Jo-Bet's complaint for superintending control with prejudice and modifying the terms of the stipulation agreed to by the parties (App 12a). Judge Zahra concluded that if the parties had intended to include the term "entertainment permit" in the agreement, they should have done so and dismissed the complaint with prejudice as if the transfer had, in fact, occurred, which it did not. As more fully set forth in the reasons for granting this writ, Judge Zahra was without legal authority to issue such order. The effect of Judge Zahra's order was to revoke Jo-Bet's liquor license and put the corporation out of business. A stay of his order was issued pending appeal.

STATE APPELLATE PROCESS

For reasons more fully set forth in the reason for granting this writ, Jo-Bet believed that it had an appeal of right, pursuant to MCR 7.203 (App 98a). On March 9, 1998, then Judge [now Justice] Maura Corrigan dismissed the Claim of Appeal of Right for want of jurisdiction (App7a). A Petition for Reconsideration was filed and on June 24, 1999, Judge Bandstra affirmed Judge Corrigan's decision.(App 6a). Jo-Bet timely filed an Application for Leave to Appeal to the Michigan Supreme Court, alleging that because superintending control was an original action, Jo-Bet had a claim of appeal of right.

The Supreme Court, on January 31, 2000, denied Jo-Bet's Application for Leave. (App 5a).

In accord with the Court of Appeals and Supreme Court orders, Jo-Bet, on February 25, 2000, filed a Delayed Application for Leave to Appeal to the Court of Appeals. The MLCC and the Attorney General, acting on their behalf, totally ignored the admissions made by them on October 10, 1996 in their Motion for Relief from Order, admitting that the understanding was that if the sale was not completed, that the order of August 4, 1995 would be vacated and the proceedings reinstated. Instead, the MLCC and Attorney General raised issues never addressed or discussed by Judge Zahra. On August 18, 2000, the Court of Appeals, without stating a reason, denied Jo-Bet's Application for Leave. (App 4a).

Jo-Bet then timely filed an Application for Leave to Appeal with the Michigan Supreme Court. Again, the Attorney General's Office and the MLCC took the position that the agreement had been fulfilled and that the intent of the parties had been completed and that the Circuit Judge acted in accordance with existing law. Again, the Attorney General's Office and the MLCC remained silent regarding the admissions of October 10, 1996 and raised issues not presented to the trial court. The Supreme Court, on July 30, 2001, denied leave. (App 1a). Jo-Bet timely filed for Reconsideration (App 70a). Jo-Bet pointed to the Michigan Supreme Court that the Attorney General's Office and the MLCC had a clear agreement with Jo-Bet and that the Attorney General's Office had, in its response to the Court of Appeals and to the Supreme Court, misled the Court and that the finding of the Circuit Court was not authorized by law and that the Attorney General's Office had breached an agreement and had_failed to fulfill a plea

bargain with Jo-Bet.[9]

Jo-Bet advised the Supreme Court that there had been an effective taking of its property, its liquor license, that Jo-Bet had never had a hearing on the merits of its arguments against the MLCC proceedings and that both counsel for Jo-Bet, Terri Morency, (App64a) and counsel for the MLCC, former Assistant Attorney General Thomas Giachino (App 56a) agreed as to the intent of the parties regarding the stipulation and order of August 4, 1995. Jo-Bet further advised the Michigan Supreme Court that the breach of the plea bargain and failure of the appellate courts to use their supervisory and appellate powers to correct a clear wrong and the taking of Jo-Bet's property would constitute a violate of due process and equal protection under the 14th Amendment. The Michigan Supreme Court, on November 30, 2001, denied reconsideration. (App 2a).

In the Motion for Rehearing and Reconsideration, Jo-Bet asked in the alternative that the Supreme Court set an appeal bond so that it might continue to operate pending a Petition for Writ of Certiorari to this Court. The Supreme Court, in its order of November 30, 2001, failed to address this issue and Jo-Bet filed another motion regarding issuance of a stay, which the Supreme Court denied on December 21, 2001.

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9. Actually, the Attorney General's Office and the MLCC had breached two agreements with Jo-Bet. The first agreement was to promptly notify Jo-Bet of any violations which issue was raised in Jo-Bet's Complaint for Superintending Control but not addressed because of the plea bargain. The second plea bargain was to allow Jo-Bet to sell and if the sale was not completed, dismissal would be without prejudice and could be reinstated.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

As more fully set forth hereinafter, there are numerous reasons for granting this Writ. The decision of the Michigan Supreme Court to deny judicial review has effectively decided important federal questions in a way that conflicts with the decisions of this Court and the United States Court of Appeals. Further, by denying judicial review, the Michigan Supreme Court has decided important questions of federal law that have not been, but should be, settled by this Court. This is not a case where there has been a misapplication of law or mere error by a lower court judge, this is a case where the State of Michigan, through the Michigan Liquor Control Commission and the Office of the Attorney General, entered into an agreement, a plea bargain, with Petitioner and then breached that agreement.

While this Court has addressed application of constitutional principles in agreements or plea bargains in criminal cases, it has not done so in "quasi-criminal" cases. This is a case where, with the retirement of one Assistant Attorney General, the superceding Assistant Attorney and the Office of the Attorney General of the State of Michigan changed their minds and decided not to be bound by the agreement the State had entered with Petitioner.

This is a case where the Michigan Supreme Court, vested by law with appellate and supervisory powers, knowingly allowed a property right to be taken because of a decision by a lower court where that lower court was not vested with authority to modify a stipulated order of the parties without their consent..

As more fully set forth hereinafter, the Michigan Supreme Court's refusal to grant leave and to address the issues of prosecutorial misconduct, of constitutional magnitude, and to deny review of a lower court decision issued beyond the scope of that court's authority is, in and by itself, a violation of due

process and equal protection, contrary to the 14th Amendment of the United States Constitution.

To avoid ruling on Petitioner's claims of appeal, the Michigan appellate courts, including the Michigan Supreme Court, denied review at every turn. The specter of Jo-Bet being a topless bar tainted the litigation from its inception and that fact had no less impact on the Michigan Supreme Court. By turning a blind eye, the Michigan Supreme Court knowingly participated in the taking of a vested property right, contrary to the 5th Amendment of the United States Constitution.

A stipulation is a voluntary agreement made in a judicial proceedings by parties thereto or by their attorneys. Black's Law Dictionary, 5th Ed. Under Michigan law, "a stipulation is a type of contract". Limbach v. Oakland County Board of County Road Com'rs, 226 Mich App 389; 573 NW 2d 336 (1997). A stipulation is "a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." Brd of County Rd Com'rs for County of Eaton v. Schultz, 205 Mich App 371; 521 NW 2d 847 (1994).

In Michigan, a court may not make a new agreement or give existing contracts or stipulations interpretations contrary to the expressed intent of the parties. Smeader v. Mason, 341 Mich 139; 67 NW 2d 131 (1954). It is the duty of the court to determine, if possible, the true intent of the parties and the court is under an equal duty to attempt to effectuate the intent of the parties when the agreement was consummated. Stroud v. Glover, 120 Mich App 258; 327 NW 2d 462 (1982). Further, a contract or stipulation must be evaluated or construed in the light of "surrounding circumstances, and cognizant of the realistic and legitimate expectations of the parties." Walter Toebe and Co. v. Dept of State Highways, 144 Mich App 21; 373 NW 2d 233 (1985).

"A consent judgment reflects primarily the agreement of the parties...the action of a trial judge in signing a judgment based thereon is ministerially only. The parties have not

litigated the matters put in issue, they have settled. The judge did not determine the matters put in issue, but has merely put his stamp of approval on the parties' agreement disposing of the matters." American Mut. Liability Ins. Co. V. Michigan Mut. Liability Co., 64 Mich App 315; 235 NW 2d 769 (1997). "A court cannot remake a contract through construction or by the addition of words define a meaning not intended." Damerau v. CL Rieckhoff Co., Inc., 155 Mich App 307; 399 NW 2d 502 (1986).

A judge merely approves a stipulation or agreement "and a consent judgment is unlike a litigated judgment, in that it does not reflect the considered judgment of the court after litigation of the issues." Sylvania Silica Co. v. Berlin Tp. 186 Mich App 73; 463 NW 2d 121 (1990). A consent judgment, in the absence of fraud, mistake or unconscionable advantage, may not be set aside or modified without the consent of the parties. Trendell v. Solomon, 178 Mich App 365; 443 NW 2d 509 (1989).

In federal proceedings, a United States District Judge cannot amend or modify a consent order or judgment at will under Rule 60(b) F.R.Civ. P., as the Third Circuit noted, in Delaware Valley Citizens Council v. Com. PA., 674 F 2d 976 (1982):

> Such relief is extraordinary and may be granted only upon a showing of exceptional circumstances...We recognize, as well, that while consent decrees are judicial acts, they have often been recognized as having many of the attributes of a contract voluntarily undertaken....And where, as here, the defendants made a free calculated and deliberate choice to submit to an agreed upon decree

> rather than seek a more favorable litigated judgment their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost. Philadelphia Welfare Rights Org. V Shapp, 602 F. 2d 1114, 1119-20 (3d Cir. 1979) (citations omitted), cert. Denied, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed 2d 660 (1980). The party seeking a modification of a consent decree must bear a heavy burden of showing circumstances so changed that "dangers, once substantial, have become attenuated to a shadow," United States v. Swift & Co., 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932), and that, absent such relief an "extreme" and "unexpected" hardship will result. (Id)...

As set forth in the Stipulation and Order of Settlement (App 12a), the stipulation provided that dismissal of the superintending control action would be **without prejudice until the license transfer was completed. The license transfer was never completed.** As set forth in the Affidavit of Terri Morency, it was the intent of counsel that should the sale of Jo-Bet to a third party not be completed, the order of August 4, 1995 would be vacated and the action for superintending control resumed. In no case was the agreement to be construed, if the sale was not completed, to deprive Jo-Bet of its action for superintending control.

She states:

> That it was never the understanding of Affiant or her client, Jo-Bet, Inc., that should the sale of Jo-Bet, Inc. be denied because of refusal to transfer the entertainment permits, that Jo-Bet, Inc. would be denied the right to continue with its Complaint for Superintending Control and that dismissal would be with prejudice. The original stipulation offered by the MLCC did not provide for reinstatement should the transfer of Jo-Bet's license and permits not be approved and paragraph 3 providing that dismissal was without prejudice was to provide for the reinstatement should the sale fail to be approved.

Ms. Morency's affidavit is consistent with the admissions of the attorney in the October 10, 1996 Motion for Relief from Order Entered in Case No. 95-501060-AS (App 56a).

As set forth above, in the Attorney General's Motion for Relief from Order on October 10, 1996, the Attorney General stated:

> **The parties' Settlement Agreement cannot be implemented due to the unfavorable ruling by Circuit Court Judge James Rashid wherein it was determined the local community has a right to deny an entertainment permit to be transferred with the**

> **license...Petitioner's inability to obtain local community approval for the entertainment permit so it could transfer the entertainment permit with the license causes the parties' settlement, respecting case No. 95-501060-AS...to be null and void. Thus it is necessary that this appeal matter proceed to judicial review of the commission's licensing order revoking Petitioner's license." (App 57a)**

In the Memorandum in Support of the Motion of October 10, 1996, the Attorney General stated:

> **In this case, the substantial rights of the parties are not detrimentally affected. Each party's rights of appeal of the matter at issue are protected...The present order fails to carry out the parties' intentions....Both equity and practical need for final resolution of a matter requires that the present order in this case be set aside and the case be restored to this Court's docket...(App 62a)**

The admissions of the Attorney General could not be clearer. Judge Zahra, believing that there remained a possibility that Judge Rashid would change his mind, denied the motion, but provided that the MLCC could renew the motion at a later time. (App 54a-55a). Thereafter, Giachino retired and the Attorney General's office changed its legal position.

In Michigan, the Attorney General is the sworn Minister of Justice. Weller v. People, 30 Mich 16 (1874). He or she is a quasi judicial officer. Meister v. People, 31 Mich 99 (1875). The Attorney General has supervision of all prosecuting attorneys. In Re: Watson, 293 Mich 263; 291 NW 652 (1940).

The Attorney General for the State of Michigan is in a position comparable to the United States Attorney. In U.S. v. Young, 470 U.S. 1 (1985), Justice Blackman wrote:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Berger v. United States, 295 U.S. 78, 88 (1935). Accord, Viereck v. United States, 318 U.S. 236, 248 (1943). Cf. ABA Model Rules of Professional Conduct, Rule 3.8 comment (1984) 'A prosecutor has the responsibility of a minister of justice and not simply that of an advocate'; ABA Model Code of Professional Responsibility EC 7-13 (1980) prosecutor owes a 'special duty'; ABA Standard for

Criminal Justice 3-5, 8 p 3.88 (2d ed. 1980).

In July, 1997, the Attorney General filed a Motion to Dismiss Jo-Bet's Complaint for Superintending Control with prejudice, stating that the Commission "intends to effect its Orders of Revocation. Petitioner has not transferred its license within 90 days as required by paragraph 2(a) of the Settlement. The intent of the parties is no longer relevant to the Attorney General." Either the Stipulated Order became a nullity when the City of Southgate refused to transfer the entertainment permit and the buyer rescinded, or it did not. On October 10, 1996, the Office of the Attorney General said that it did, eight months later it changed its mind.

When Judge Zahra began to interpret the August 4, 1995 Stipulation in a manner inconsistent with the intent of the parties, the Attorney General, as the representative of a sovereign, had a legal duty to speak and inform the Court that the Court was construing the agreement in a manner inconsistent with the intent of the parties. The Michigan Attorney General did not. The Michigan Attorney General had changed its mind between October 1996 and November 18, 1997 and therefore remained silent. On appeal, the Office of the Attorney General also remained silent.

The silence of the Attorney General with reference to the November 18, 1997 Order of Judge Zahra violates Brady v. Maryland, 373 U.S. 83 (1963). Effectively, by remaining silent, in the trial court and on appeal, failure to confess that the trial court had committed an error, effectively withheld evidence favorable, if not dispositive, in favor of Jo-Bet, Inc.

The agreement between the MLCC, Attorney General and Jo-Bet pertained to liquor license revocation proceedings. In Michigan, license disciplinary or revocation proceedings are "quasi-criminal in nature", State Bar Grievance Administrator v. Freid, 388 Mich 711; 202 NW 2d 692 (1972), as are forfeiture proceedings. In Re: Forfeiture $53, 178 Mich App

480; 444 NW 2d 182 (1989). In U.S. v. Marlof, 173 F. 3d 1213 (9th Cir. 1999), the 9th Circuit stated:

> We have previously stated that we are 'particularly wary of civil forfeiture statutes, for the imposed 'quasi-criminal' penalties without affording property owners all of the procedural protections afforded criminal defendants.' United States v. $191,910.00 in U.S. Currency, 16 F 3d 1051, 1068 (9th Cir. 1994). This Court, as early as 1904, in Ah How v. United States, 193 U.S. 65 (1904), recognized that "proceedings for penalties and forfeitures" are quasi-criminal in nature. In regard to quasi-criminal proceedings, this Court, in New York v. Jersey, 256 U.S. 296 (1920), recognized that a state Attorney General may enter into compromises and suits where the State is an interested party which will be binding on the State.

In U.S. v. Randolph, 230 F 3d 243 (6th Cir. 2000), the Circuit Court stated:

> To be sure '[p]lea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law.' U.S. v. Robison, 924 F 2d 612, 613 (6th Cir. 1991). However, they are more than that. In Santobello v. New York, 404 U.S. 257, 261 (1971), the Supreme Court stated that the considerations justifying the practice of plea bargaining 'presuppose fairness in securing agreement between an accused and a prosecutor'--a presupposition derived from the constitutional guarantee of due process. Furthermore, this court has stated:

'Although plea agreements are contractual in nature, a defendant's underlying right of contract is constitutional, and therefore implicates concerns in addition to those pertaining to the formation and interpretation of commercial contracts between private parties. Therefore, '[b]oth constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in the plea agreements.'

In Peavy v. U.S., 31 F 3d 1341 (6th Cir. 1994), the Sixth Circuit stated: 'A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack.' Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed 2d 473 (1962). '[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.' Santobello, supra.

In Santobello, supra, Justice Berger, speaking for the

Court, held that a state is bound by its promise to the extent that a defendant may seek specific performance of that promise. Mr. Justice Douglas, in his concurring opinion, equated failure of the state to fulfill its promise to a "'deceptive contrivance' akin to those we condemned in Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341 79 L.Ed 91 [1934] and Napue v. Illinois, 306 U.S. 264, 79 S.Ct. 1173, 3 L.Ed 2d 1217 [1959]" In the opinion of Mr. Justice Douglas, failure of a state to fulfill a promise is the equivalent of false testimony by an officer of the court.

Michigan Rules of Professional Conduct 3.3 state, in pertinent part, that: "A lawyer shall not knowingly fail to disclose material fact to a tribunal when necessary..." (App118a). In People v. Sinic, 603 NE 2d 97 (1994), the Illinois Supreme Court held that the Canons of Ethics imposes upon attorneys, as officers of the court, a duty to make full and frank disclosure of all fact the court ought to know.

The failure of the Attorney General to fulfill its promise and to disclose to the Michigan Supreme Court that the trial court had committed error and that the intent of the parties in reaching the stipulation had not been fulfilled, resulted in Jo-Bet losing a protected property right. In Bundo v. City of Walled Lake, 395 Mich 679; 238 NW 2d 154 (1976), the Michigan Supreme Court held that a liquor licensee had a vested property right in its liquor license. This Court, in Perry v. Sindrmann, 408 U.S. 593 (1972), held that federal courts determine protected property interest under state law. Jo-Bet, when it entered into the agreement, with the clear understanding that if the sale of its business was not completed, that the state litigation would be reinstated. Under Bundo, supra, Jo-Bet made a "clear showing" of a vested property right requiring 14th Amendment scrutiny. Further, Jo-Bet is a person entitled to due process protection.

Petitioner acknowledges that under Abney v. U.S., 431 U.S. 651 (1977), this Court held that there is not a constitutional right of appeal. However, as this Court has

acknowledged, most states, by constitution, have created a state constitutional right of appeal. In Michigan, Article VI, § 4, provides the Michigan Supreme Court with superintending control over all courts and appellate jurisdiction.(App 95a). Further, by Michigan Court Rule 7.301 and 7.203, the Michigan Supreme Court and the Court of Appeals are vested with appellate jurisdiction.

Once vested with appellate jurisdiction, the Michigan Supreme Court was obligated to provide Petitioner with due process. It did not. While a judgment of the state Supreme Court is not violative of due process under the 14th Amendment, even if erroneous, it cannot be as a result of evasion of a constitutional issue or as a result of an arbitrary or capricious action. Amer. Ry. Express v. Kentucky, 237 U.S. 269 (1927). In this case, the Supreme Court was fully advised, both in the Application for Leave to Appeal and in the Motion for Reconsideration, of the constitutional issues denying Jo-Bet due process and equal protection. Not once, but twice, the Michigan Supreme Court refused to review the issue and evaded the constitutional questions.

The trial court either forgot or was not informed by the Attorney General of the admission that the intent of the parties in the plea bargain had not been fulfilled and that the superintending control action should be reinstated. The constitutional issues surrounding the trial court's decision could not be raised to the trial court, but only to the appellate court.

Jo-Bet filed a Claim of Appeal of Right. The action filed in the Wayne County Circuit Court was an action for superintending control. In Beer v. City of Frasier Civil Service Com'n, 127 Mich App 239; 338 NW 2d 197 (1993), the Michigan appellate courts held that "superintending control is not an appeal. It is an original civil action designed to require the defendant to perform a clear legal duty." The Michigan Supreme Court, in Public Health Dep't v. Rivergate Manor, 452 Mich 495; 550 NW 2d 515 (1996), stated that superintending

control was not available to a party who h ad another adequate remedy by way of appeal. As an original action, Jo-Bet filed for Appeal of Right from the dismissal of the complaint for superintending control with prejudice. The Court of Appeals denied the claim and the Supreme Court refused to grant leave. Jo-Bet was then left with no remedy but seeking application for leave to the Court of Appeals. Again, the Court of Appeals refused to grant judicial review and the Supreme Court did likewise. The Michigan Court of Appeals and the Michigan Supreme Court violated their own decisions in order to deny Jo-Bet an appeal.

The issues before the state court did not pertain to the revocation and were not an appeal from the decision of the MLCC. The issue presented to the Michigan Court of Appeals was the dismissal of an original complaint for superintending control by a lower court's modification or alteration of a stipulated order. These questions relate only to an original action and, under MCR 7.203, are appealable of right. (App 98a). Whether by right or by leave, the appellate courts of the State of Michigan were going to evade ruling on the due process and taking issues presented by Jo-Bet's appeal.

In Galvan v. Press, 347 U.S. 522, 530 (1954), Mr. Justice Frankfurter, speaking for this Court, stated that the essence of due process was fair play. The 5th Amendment of the United States Constitution holds that a person may not be deprived of property without due process of law. Jo-Bet was not afforded due process or equal protection and there was certainly nothing "fair" about the proceedings below.

In Application of Gault, 387 U.S. 1 (1967), this Court stated:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or

> inaccurate finding of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: 'The history of American freedom is, in no small measure, the history of procedure.' But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science."

Violation of due process and equal protection, holdings inconsistent with the decisions of this Court, the various Circuit Courts and the decisions of other state Supreme Courts are but two of the reasons for granting this Writ. The issue of a state's obligation to fulfill a promise made in a quasi-criminal litigation is an issue of import to all jurisdictions and all states. What

criminal protections apply to a party like Jo-Bet in quasi-criminal litigation? The duty of the state and the rights of a property owner in a quasi-criminal litigation have not been addressed by this Court and constitutes another reason for granting the Writ. If a state breaches its promise in penalty, forfeiture or license revocation proceedings, the 14th Amendment is rendered meaningless in these types of cases and the number of quasi-criminal cases has been increasing geometrically.

CONCLUSION

The trial court construed a contract that was not ambiguous and modified a stipulated order without the consent of the parties and in disregard of the expressed intention of the parties, contrary to all existing Michigan and federal law. The Attorney General negotiated a resolution with Jo-Bet that, if successful, would have resolved the pending "quasi-criminal" litigation but, through the fault of neither party, the intended sale could not be completed. The Office of the Attorney General informed the trial court of the intent of the parties and that the matter should be reinstated. At that time, in the view of the trial court, there remained a possibility of the sale and therefore denied the Motion to Vacate the Order as premature.

Subsequently, the Attorney General changed its mind and thereafter hid its prior admissions from the trial court and refused to confess that the trial court had committed error. The Attorney General and the MLCC now wanted Jo-Bet's property, its liquor license.

As set forth in the beginning of this Petition, lurking in the background was the nature of Jo-Bet's business. While a constitutionally protected form of free speech, it is an area of speech whose constitutional right is frequently neglected and protection often evaded. Had the settlement in this case involved a day care center, a religious nursing home or the

license of a radio or television station the Attorney General would not have acted as it did, the trial court would not have disregarded the intent of the parties and the Michigan Courts would have granted appellate review.

Due process cannot be conditioned on the identity of the defendant or the nature of a constitutionally protected business. Under the Rooker-Feldman doctrine, Jo-Bet had no means to seek relief in the United States District Court and its only opportunity for justice lies with this Court. The Writ of Certiorari should be granted.

Dated 2/28/02

Respectfully Submitted,

Michael J. Connolly (P24739)
Attorney for Petitioner

Order

Entered July 30, 2001

117952

Michigan Supreme Court
Lansing, Michigan
Maura D. Corrigan,
Chief Justice
Michael F. Cavanaugh
Elizabeth A Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

J0-BET, INC, d/b/a HENRY THE VIII SOUTH,
Petitioner-Appellant,

V

SC: 117952
COA: 22542
Wayne CC: 95-501060AS

LIQUOR CONTROL COMMISSION,
Respondent-Appellee.

On order of the Court, the application for leave to appeal from the August 1.8, 2000, order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.
I0724

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court. certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 30, 2001

Clerk

Order

Entered: November 30, 2001

117952 (32)

JO-BET, INC,
d/b/a HENRY THE VIII SOUTH
Petitioner-Appellant,
v.

LIQUOR CONTROL COMMISSION
Respondent—Appellee.

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young Jr.
Stephen J. Markman
Justices

SC: 117952
COA: 225422
Wayne CC: 95—501060—AS

On order of the Court, the motion for reconsideration of this Court1s order of July 30, 2001 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Cmh: 1127

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 30, 2001

Clerk

Order

Entered: December 21, 2001

Michigan Supreme Court
Lansing, Michigan
Maura D. Corrigan,
Chief Justice
Michael F. Cavanaugh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

117952(36)

JO-BET, INC, d/b/a HENRY THE VIII SOUTH,
Petitioner-Appellant,

v.

SC: 117352
COA: 225422
Wayne CC: 95-501060-AS

LIQUOR CONTROL COMMISSION,
Respondent-Appellee.

On order of the Court, the motion to stay enforcement is considered, and it is DENIED, because it does not appear that the requested relief should be granted.

cmh:1218

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 21, 2001 — Corbin R. Davis

COURT OF APPEALS, STATE OF MICHIGAN
ORDER

Jobet Inc. v. Michigan Liqour Control Commission
Docket No. 225422

LC No. 95-501060-AS

Michael R. Smolenski
Presiding Judge
David H. Sawyer
Joel P. Hoekstra
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/s/ Michael R. Smolenski

Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk on

8-18-00

Date

Chief Clerk

Order

Entered: January 31, 2000

Michigan Supreme Court
Lansing, Michigan
Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

1

JO-BET, INC., d/b/a HENRY THE VIII SOUTH,
Plaintiff-Appellant,

v.

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendant-Appellee.

SC: 115097
COA: 208257
Wayne CC: 95-501060-AS

On order of the Court, the application for leave to appeal from the June 24, 1999 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court d0125

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 31, 2000

Deputy Clerk

Court of Appeals, State of Michigan

ORDER

Jo-Bet, Inc v Liquor Control Commission

Richard A. Bandstra
Presiding Judge

Docket. No208257

Donald E. Holbrook, Jr.

LC No. 95-501060-AS

William B. Murphy
Judges

Upon further consideration, the Court orders that the motion for rehearing DENIED

Furthermore, the Court directs the Clerk's Office to retain the plaintiff's answer to the motion to dismiss as it was not filed within the time period delineated in the Court's October 7, 1998 order.

A true copy entered and certified by Carl L Gromek Chief Clerk, on

JUN 2 4 1999

Date_____ /s/
Chief Clerk

IN THE MICHIGAN COURT OF APPEALS

ORDER

Jo-Bet, Inc v Michigan Liquor Control Commission
Docket No 208257
LC. No. 95-501060-AS

Maura D. Corrigan, Chief Judge, Chief Judge, acting under MCR 7.211(E)(2) and MCR 7.216(A)(10), orders:

The claim of appeal is DISMISSED for lack of jurisdiction because the November 18, 1997 order is postjudgment order that is not appealable as a matter of fight for the reason that the order in question is not the first order entered below. MCR 7.202(8)(a)(i). As a result, order in question is , appealable to this Court only on leave granted under MCR 7.205. See MCR 7.203(B)(1)

A true copy entered and certified by Carl L. Gromek, Chief Clerk. on



MAR 0 8 1999

Date

Chief Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY Of WAYNE

JO-BET, d/b/a HENRY THE VIII SOUTH,
Petitioner,

Case No. 95-501060-AS
Hon. Brian K. Zahra

v.

MICHIGAN LIQUOR CONTROL COMMISSION,
Respondent.

_____/

STEPHEN H. BOAK (P10812)
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Assistant Attorney General
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OPINION AND ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND GRANTING RESPONDENT'S MOTION TO DISMISS WITH PREJUDICE

At a session of the Court in the City County Building, Detroit, Michigan held on this: Nov 18, 1997

PRESENT: Brian K. Zahra
Hon. Brian K Zahra
Judge of the Third Circuit Court

Before the court is Petitioner's motion for relief from order and for further argument. This motion seeks review of the court's September 12, 1997 ruling from the bench that respondent's motion to dismiss appeal with prejudice would be granted. Because no written order granting dismissal was actually entered by the court, the instant motion is not properly before the court. Nonetheless, the court will treat this motion as a request to reconsider the court's September 12, 1997 ruling.

This action was commenced in January, 1995, and sought appellate review of a licensing decision made by respondent. On August 4, 1995, the litigants entered into a stipulation and order of settlement resolving the instant action. This stipulated settlement agreement stated, in relevant part:

> (2) That Court Case 95-501060-AS (this action) herein pending judicial review shall be dismissed with prejudice under the condition stated in paragraph three (3), infra, and on the following additional terms.
>
> (A) That...Jo-Bet, Inc. Will be allowed to transfer its license to a person or persons approved by the Commission within (90) days of this Court Order of Settlement or the license will be revoked.
>
> ***
>
> (3) ...[T]he parties stipulate that the subject cases will be dismissed without prejudice until the license transfer is completed.

The license transfer contemplated in Paragraph (2)(A) of the settlement agreement was never completed. The City of Southgate would consent to the transfer of the liquor license but not the transfer of an entertainment permit. The prospective buyer was not interested in an establishment that did not possess an entertainment permit.

On September 12, 1997, respondent appeared in court seeking a dismissal or, in the alternative, to set an appeal briefing schedule. Respondent argued that petitioner failed to conform to the requirements of the settlement agreement, paragraph 2(A). Petitioner argued that respondent's motion should not be granted because one the City of Southgate refused to transfer the entertainment permit, the settlement agreement was rendered null and void.

On September 12, 1997, this court found petitioner's argument to be without merit. Upon further review the court remains firmly convinced that there exists no legally justifiable reason to reopen these proceedings. Simply put, this appeal was dismissed per the August 4, 1995 stipulation and order of settlement. While paragraph 3 expressly provided that dismissal would be without prejudice until "the license transfer is completed," paragraph 2(A) provides that it was petitioner's obligation to file a request for license transfer not later than 90 days after the date of the order of settlement. Petitioner failed in this regard.

Petitioner also argues that transfer of the entertainment permits, although not expressly referenced in the settlement agreement, was an integral part of the settlement agreement. Petitioner argues that the agreement was contingent upon an "informal confirmation" from the City of Southgate that the city would approve transfer of the entertainment permit. Petitioner's argument is contrary to the express items of the settlement agreement, which states:

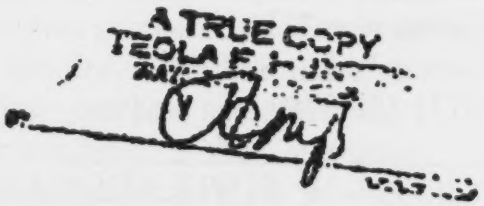
> [A]ll parties agree that they enter into this agreement voluntarily, and agree that there are no promises, stipulations, understandings or agreements other than those stated herein.

Conspicuously absent from the settlement agreement is any reference to the transfer of entertainment permits. If the parties intended the agreement to be contingent upon transfer of the entertainment permits it should have expressly stated such a contingency.

For these reasons, petitioner's motion for reconsideration is DENIED and respondent's motion to dismiss with prejudice is GRANTED.

IT IS SO ORDERED.

BRIAN K. ZAHRA
Brian K. Zahra
Judge of the Third Circuit Court



STATE OF MICHIGAN
IN THE 3RD JUDICIAL CIRCUIT COURT
WAYNE COUNTY

JO-BET, INC., d/b/a HENRY THE VIII SOUTH,
Petitioner, Hon. Brian K. Zahra
Court No. 95-501060-AS

V.

MICHIGAN LIQUOR CONTROL COMMISSION,
Respondent.

_____/

TERRI J. MORENCY(P40726)
Attorney for Jo-Bet Inc.

_____/

THOMAS J. EMERY (P22876)
THOMAS J. GIACHINO
Assistant Attorneys General Michigan Liquor Control Commission 2251
Lincoln Park, MI 48146
(313} 389-9780

_____/

STIPULATION AND ORDER
OF SETTLEMENT

NOW COMES Jo-Bet, Inc., by its attorney Terri Morency, and the Michigan Liquor Control Commission by its attorney Frank J. Kelley, Attorney General of Michigan, by Thomas J. Emery and Thomas J. Giachino, Assistant Attorneys General and stipulate as follows:

(1) That Court Case No. 94-433048-CZ heretofore dismissed by this Court without prejudice will be dismissed with prejudice, under the condition stated in paragraph three, infra.

(2) That Court Case 95-501060-AS herein pending judicial review shall be dismissed with prejudice under the condition state in paragraph three (3), infra, and on the following additional terms:

(A) That the Commission's licensing decision in Case No. 95-501060-AS shall be remanded to the Commission for a modification of its penalty order for that of revocation to one where in Jo-Bet, Inc. will be allowed to transfer its license to a person or person approved by the Commission within ninety (90) days of this Court Order of Settlement or the license will be revoked.

(B) That the Michigan Liquor Control Commission hereby agrees to an immediate investigation and licensing transfer process for any written purchase agreement submitted to the Commission by Jo-Bet, Inc. during the ninety day period and if any such written purchase agreement and transfer request cannot be completed by the Commission withing the ninety day agreed period, upon the showing of good cause, the Commission shall extend said period to allow for any pending written transfer application to be completed.

(C) That upon the transfer date of the license, Jo-Bet, Inc. shall tender and pay in full the sum of twenty- thousand dollars ($20,000) as liquidated damages and costs.

(D) That pending the license transfer process, Jo-Bet, Inc. by its agents, clerks, or employees shall prohibit all dance

performers and patrons on the licensed premises from engaging in any physical touching of groin areas for men, or pubic region for women, in and during table dance performances. If the Commission discovers and proves a violation of this agreement, it may order the license immediately suspended pending the license transfer process.

(3) That any settlement of these cases under the terms of this agreement is in the nature of a consent judgment freely entered into by all tho parties with no right of any further administrative relief, or any further judicial review, under the captioned pleadings in case No. 94-433048-CZ and 95-501060-AS, but parties stipulate that the subject cases will be dismissed without prejudice until the license transfer is completed.

(4) That all parties agree that they enter into this agreement voluntarily, and agree that there are no promises, stipulations, understandings other than those stated herein,

(5) That Jo-Bet, Inc. is aware that by this agreement and the Commission's modified order, Section 51 of 1933 PA 8, MCL 436.51 is applicable and no license shall thereafter be issued during the ,statutory period of disqualification.

ORDER OF SETTLEMENT

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan,

ON: AUG 4 1995

PRESENT:_____

Circuit Court Judge

This Court being fully advised in the premises and having reviewed tho signed stipulation herein submitted, and herein incorporated, Orders as follows:

IT IS HEREBY ORDERED that Case No. 94-433048-CZ and 95-501060-AS be dismissed, and the parties captioned are bound by terms of the stipulation entered into and incorporated herein.

BRIAN K. ZAHRA

_____

Honorable Brian K. Zahra
Circuit Court Judge

Approved for entry:
For Jo-Bet, Inc.:
/s/
John Hamilton, President
/s/
Terri J. Morency, Esq.
Attorney for Jo-Bet, Inc.
For the Michigan Liquor Control Commission:
Senator Phillip Arthurhultz, Chairman,
Commissioners Maxine L, Perry and Betty E. Pulliam
/s/
Kenneth Woziak
Commission Aide
/s/
Thomas J. Giachino
Assistant Attorney General 4

D/B/A HENRY THE EIGHTH -SOUTH

ORDER

The Administrative Law Judge, in consideration of the violation(s) in this case and the many other similar violations, Orders the licenses and permits, revoked.

CHARGES-June 24, 1992-Complaint No. 2-1826

(1) Allow in or upon the licensed premises a person, one "Sunshine" who performed actual and/or simulated masturbation on a patron, contrary to Rule R. 436.1411(1), as promulgated in the Michigan Administrative Code.

ORDER

The Administrative Law Judge, in consideration of the violation(s) in this case and the many other similar violations, Orders the licenses and permits revoked.

AMENDED CHARGES-July 15, 1992-Complaint No. 2-1827

(1)Allow in or upon the licensed premises a person, one "Kristen" Who performed actual and/or simulated masturbation on a patron, contrary to Rule R. 436.1411(1), as promulgated in the Michigan Administrative Code.

(2)Allow in or upon the licensed premises, a person, one "Kristen", who performed simulated fellatio on a patron, contrary to Rule R 436.1411(1), as promulgated in the Michigan Administrative Code.

(3)Allow in or upon the licensed premises a person, a one "Kristen", a performed actual and/or simulated sexual intercourse with a patron, contrary to Rule R 436.1411(1), as promulgated in the Michigan Administrative Code.

ORDER

The Administrative Law Judge, in consideration of the violation(s) in this case and the many other similar violations, Orders the licenses and permits revoked.

APPEAL BOARD ORDER

The Appeal Board adopts the Findings of Fact and Conclusions of Law Judge in these matters.

The Appeal Board has taken into consideration the arguments presented at the Appeal Hearing pertaining to the Licensee's due process of law as related to the timely notification of these violations, the timely scheduling of the violation hearings, and the timely notification of the results of the violation hearings and finds these arguments to be without merit. Further, the Appeal Board finds that the Licensee requested and received postponements and the hearings scheduled in these matters on March 17, 1993 and April 7, 1993, thus delaying the proceedings in these matters on its own initiative.

Additionally, the Appeal Board has taken into consideration the arguments presented at the Appeal Hearing relative to the legality of lap dancing itself and is convinced that the Administrative Law Judge was correct in finding that the lap dancing alleged in these violations does constitute the simulation of sexual acts contrary to Rule R 436.1411(1), as promulgated in the Michigan Administrative Code. It is therefore the Order of the Appeal Board that the Orders in these matters issued by Administrative Law Judge Thomas A. VanTiem, Sr. be AFFIRMED.

MICHIGAN LIQUOR CONTROL COMMISSION

Dated: January 4, 1995

/s/
Maxine L. Perry, Chairwoman

/s/
Betty E. Pulliam Commissioner

Jacquelyn A. Stewart, Commissioner

David M. Gadeleto
Assistant Attorney General
7150 Harris Drive,
PO Box 300
Lansing, MI 48909

Terri J. Morency, Attorney at Law
1803 Middlebelt
Westland, MI 48185

TRUE COPY

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

JO-BET, INC
d/b/a HENRY THE EIGHTH - SOUTH,
a Michigan corporation,
Plaintiff,

v

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendant.
_____/

Terri J. Morency (P40726)
Attorney for Plaintiff
8103 Middlebelt Rd.
Westland, MI, 48185
(313) 425-1189

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

NOW COMES Plaintiff, JO-BET, INC., d/b/a HENRY THE EIGHTH-SOUTH, a Michigan corporation, (hereinafter "Plaintiff") by and through its attorney, Terri Morency, pursuant to MCR 2.605 and MCR 3.310 and asks this Court to enter a declaratory judgment that scienter is a necessary element of Michigan Liquor Control Commission Rule 436.1411, the Rule is unconstitutional for over breadth and void for vagueness, that the Commission has violated its own rules, that the association between the Attorney General of the State of Michigan's Office and the Michigan Liquor Control Commission violates substantive and procedural due process, that there is an attempt by the Michigan Liquor Control Commission and those acting in concert with the Commission to deprive Plaintiff of its

property without just compensation, contrary to Article 10 §1 of the Michigan Constitution of 1963 and the Fifth Amendment of the United States Constitution, that the hearing procedure used by the Commission in the instant case, including decisions by Commissioner Van Tiem without being present for the testimony and without transcripts, violates substantive and procedural due process, entrapped, misled or misrepresented to Plaintiff conduct that was allegedly permissible under the rules of the Liquor Control Commission so as to place its license in jeopardy and enjoin enforcement of the aforementioned violations against Plaintiff until there has been a full and complete hearing on this Declaratory Judgment action and shows unto this Honorable Court as follows:

COMMON AVERMENTS

1. That Jo-Bet, Inc. is a Michigan corporation, known as Henry the Eighth - South, with its principal offices located in the County of Wayne, State of Michigan.
2. The Michigan Liquor Control Commission (hereinafter "MLCC") is an agency of the State of Michigan under the direction and control of the Department of Commerce with its primary offices in Lansing, Michigan.
3. That on or about October 24, 1985, Plaintiff received a liquor license from the State of Michigan to operate a bar at 15480 Dix, Southgate, Michigan.
4. That in addition to the liquor license, Plaintiff also obtained, in 1985, an entertainment license that permits dancing, entertainers, and theatrical performances to occur on the premises.
5. That from 1985 to 1991, Plaintiff was without violation by the MLCC.
6. That at a point, some time prior to May 10, 1991, relationship between Plaintiff and Southgate Detective Lieutenant Lawrence Lokuta became strained and as a

result, Lokuta began to under take harassment of Plaintiff through unusual and excessive law enforcement activities.

7. That on or about May 10, 1991, and May 17, 1991, Lokuta caused law enforcement officers to charge Plaintiff with its first liquor violations.

8. That on or about June 13, 1991, Plaintiff was raided by a group of law enforcement officials led by Lokuta, allegedly with "Jane Doe" misdemeanor warrants for seven (7) dancers, who were independent contractors, performing at Plaintiff's bar, on charges of indecent and obscene conduct. Lokuta, when he led the raid, entered Plaintiff's property with no search warrant.

9. That to effectuate the misdemeanor arrests on persons not employed in Plaintiff, Lokuta stopped all entertainment, blocked all exists, and instructed all persons in attendance including patrons, that they could not leave the premises. Lokuta then produced a narcotics sniffing dog and detained persons on the premises for two and half hours while police searched the premises. No drugs were found as it pertained to Plaintiff.

10. That a bar such as the one operated by Plaintiff relies heavily on its relationship with law enforcement for the maintenance of order and protection.

11. That following the June 13, 1991 raid by Lokuta, Plaintiff and John Hamilton, secretary and 50% stockholder of Plaintiff corporation, filed suit in the United States District Court for the Eastern District of Michigan alleging violations by Det. Lokuta under 42 USC 1983.

12. That thereafter, in an effort to smooth relations with Det. Lt. Lawrence Lokuta, John Hamilton, on behalf of Plaintiff, together with Attorney Terrance P. Conlin,

entered into a series of discussions with Lokuta and the MLCC to resolve the first liquor control violations that Plaintiff had ever received, in an amicable manner.

13. That Plaintiff rents to dancers the right to perform on Plaintiff's premises an independent contractors. In the course of a month, more than 100 different dancers may perform.

14. That the various dancers perform at Plaintiff's establishment and elsewhere under an alias. On any given day there may be two, three, four or more girls performing under the alias "Lori", "Angel", "or "Ruth".

15. That Lokuta objected to the rental of Plaintiff's facilities for dancers to perform under an alias. Lokuta stated that he could not identify the dancers under their alias or obtain accurate addresses. Therefore, if there was a dancer that acted in violation of MLCC rules or in violation of ordinance or statute, Lokuta could not make a subsequent arrest.

16. That on or about March 27, 1992, a settlement was negotiated with the MLCC and Lokuta as it pertained to the first alleged violations by Plaintiff of MLCC rules. It was agreed that Plaintiff would plead no contest to the complaints, a fine would be levied and Plaintiff would take corrective actions as to the means by which the dancers could be identified.

17. In accordance with the negotiated settlement, a form was prepared and approved by Lokuta and Defendant Commission wherein each dancer, performing on any given day at any given time would complete a form listing the alias under which the performer was dancing at that time together with the dancer's address. In addition, the form expressly stated conduct which would be prohibited by the dancers. In other words, the form expressly stated that the dancer could not perform conduct in violation of MLCC rules.

18. That implicit or expressed in the agreement between Plaintiff, Lokuta and MLCC constituting the negotiated settlement, was an agreement that violations, by dancers, of the MLCC rules would be immediately reported to Plaintiff's agents and employees and Plaintiff's agents and employees would immediately terminate the right of a dancer to perform in its establishment.

19. That Plaintiff and its secretary, John Hamilton, did not terminate their law suit for violations of 42 USC 1983 against Detective Lokuta.

20. That Lokuta, with the knowledge and consent of the MLCC, direct or implied, continued to harass Plaintiff.

21. That on or about June 24, 1992, a few days after the negotiated settlement and completion of the forms mandated by the settlement, Lokuta enlisted the assistance of Michigan State Police Narcotics Unit known as "DRANO", down river area narcotics organization. Det. Lokuta did not enlist the assistance of DRANO for narcotics investigation but for the purpose of harassing Plaintiff and to retaliate for Plaintiff's law suit in Federal Court for violation of 42 USC 1983.

22. That Lokuta did not merely enlist the services of a particular officer to "go under cover" to determine if the independent contract dancers were violating MLCC rules but instead, enlisted the assistance of numerous officers and a "surveillance crew".

23. That on or about July 15, 1992, Det. Lokuta together with the same officers and "surveillance crew" again entered Plaintiff's premises to engage dancers for the purpose of enticing the dancers to violate MLCC rules.

24. That contrary to the expressed or implied agreement between the MLCC, Det. Lokuta and Plaintiff, on or about March 27, 1992, neither Lokuta nor any of the

officers associated with him nor anyone from the MLCC, on June 24, 1992, or July 15, 1992, advised Plaintiff, its agents, or employees that there was a violation or potential violation of MLCC rules occurring on the premises so that Plaintiff could take corrective action.

25. That on or about November 12, 1992, Lokuta directed two Southgate police officers, Anthony Kibin and Paul Sadowski to enter Plaintiff's establishment, contact the manager and ask to see the dancers' forms as per the agreement in March, 1992.

26. That the officers were given by the manager numerous "3 x 5 cards". The 3 x 5 cards contained stage names, phone numbers and addresses plus an accordian file with the approved forms.

27. That the Southgate officers did not inform Plaintiff, its agents, or employees that there had been any prior alleged violations of the MLCC rules, but were supplied the materials as per the agreement as to the dancers' names and addresses on the given day. Records more than 30 days old were not required to be maintained.

28. That Lokuta and the MLCC took no action until mid-January, 1993, six to seven months after the alleged event when they issued liquor violations against Plaintiff for the conduct of certain unidentified dancers. The complaint identified the dancers by alias such as a "Lori" or "Ruth", after it was possible for Plaintiff to identify the correct individual.

29. That there is pending presently against Plaintiff several violations alleging that Plaintiff violated MLCC Rule 436.1411 which prohibits: "On-premiss licensee shall not allow in or upon licensed premise a person who performs or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio or cunnilingus."

30. That on or about September 14, 1993, hearings on the alleged violations were commenced before the Honorable Alex G. Laggis, Commissioner. The proceedings were subsequently adjourned without Laggis' timely opinior or extension, and resumed on May 18 and 19, 1994. This time, however, Administrative Law Judge Thomas A. Van Tiem, Sr. was conducting the hearings.

31. That prior to the commencement of the hearings, the City of Southgate, the Chief of Police of the Southgate Police Department, the Mayor and city officials requested that the alleged violations be dismissed, which Plaintiff submits was prompted by their knowledge that Lokuta's actions were vindictive and contrary to agreements, but the MLCC and the Attorney General's Office proceeded on their own, contrary to custom and procedure in the industry.

32. That on or about June, 1994, Judge Van Tiem issued opinions in all violations, dismissing three (3) and finding Plaintiff responsible for the remainder of the violations, including those hearings held by Alex Laggis for which no transcript was prepared and ordered Plaintiff's liquor license to be revoked.

33. That Plaintiff, in July, 1994, timely petitioned the MLCC for a de novo hearing before the full Commission.

34. That exhaustion of administrative remedies does not apply: (1) where it is obvious to that to pursue additional procedures would be a useless effort (as in the instant case), or; (2) when a controlling constitutional issue is raised in administrative proceedings. Dickerson v Warden, Marquette Prison, 99 Mich App 630; 298 NW2d 841 (1980). Also see Adkins v Department of Civil Service, 140 Mich App 202; 362 NW2d 919 (1985).

35. That Defendant MLCC is a governmental agency and is governed by the Administrative Procedures Act MCL 24.201 et seq.; MSA 3.560 (101) et seq. Administrative boards are not permitted to consider constitutional challenges. Wronski v Sun Oil Co. 108 Mich App 178; 310 NW2d 321 (1981). Declaratory judgment may be sought under Dukeshere Farms, Inc. v Director of the Department of Agriculture, 53 Mich App 489; 220 NW2d 46, rev'd 393 Mich 758 223 NW2d 294 (1974), app after rem, 73 Mich App 212, 251 NW2d 278 (1977), aff'd 405 Mich 1, 273 NW2d 877 (1979). In Dukesherer, the Court stated:

In Dukesherer, the plaintiff sought declaratory relief after its right to petition for review had lapsed due to the expiration of the time for the filing of a petition. This Court held that in the absence of the availability of the administrative proceeding a declaratory action could be heard, but that the circuit court had not abused its discretion in refusing to entertain[152 MICH APP 371] the declaratory action. 53 Mich.App. 489, 220 N.W.2d 46. Our Supreme Court reversed on the sole ground that the circuit court had abused its discretion. 393 Mich. 758, 223 N.W.2d 294.

36. That in the instant case there has been an expiration of the time to file a petition for review.

COUNT I

UNCONSTITUTIONALITY AND APPLICATION

37. That Plaintiff incorporates by reference paragraphs 1 through 36 of this Complaint as if fully set forth herein.

38. That as set forth above, Rule 436.1411 states: "An on-premiss licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio or cunnilingus."

39. That MLCC Rule 436.1411 does not define the term "simulate".

40. That Black's Law Dictionary defines simulate as: "To assume the mere appearance of, without the reality; to assume the signs or indications, falsely; to counterfeit; to feign; imitate; pretend."

41. That the MLCC, through Commissioner Laggis, at the time of the negotiated settlement in 1992, approved directly or by implication "lap dancing" as was taking place at Plaintiff's bar and similar establishments and for the purposes of enforcement of the Rule constituted lap dancing as not a "simulated" act and not in violation of MCR 436.1411.

42. That as set forth in State v Dizzy Duck, 203 Mich App 250; 511 NW2d 907 (1994), lap dancing was not, itself, lewd.

43. That the MLCC has approved various forms of "social dancing" which includes the tango and other popular dances that "simulate" sexual acts including "intercourse" and the MLCC does not enforce or prohibit such dancing.

44. That MLCC and the various law enforcement agencies do not enforce the regulation for hand motions that may be suggestive of masturbation by comedians or other entertainers, however such actions could, as written under the rule, constitute "simulated" masturbation.

45. That the rule is overly broad and void for vagueness or, alternatively, is being discriminatorily and subjectively enforced to the extent that it denies licensees equal protection under the law through the 14th Amendment of the United States Constitution and fails to inform the licensee of prohibited acts or conduct.

46. That while the MLCC Rule 436.1411 has been contested as to constitutionality regarding violations of

freedom of speech and expression, the Statute has never been construed in terms of its definition and application. This is a case of first impression.

47. That the MLCC and the rule as written ignores the requirement of scienter. By definition, scienter is "knowledge".

48. That MLCC Rule 436.1409 and MLCC Rule 436.1411 speak in terms of the licensee allowing certain conduct or actions. The word "allow" has not been legally defined in the State of Michigan. According to Black's Law Dictionary, 5th Edition, the word allow "has no rigid or precise meaning, its import varying according to the circumstances in connection with which it is used."

49. That as used in the two aforementioned Rules, the word "allow" means consent. Consent requires knowledge or scienter. The Rule as applied by the MLCC subjects a licensee to punishment and revocation without knowledge or scienter and same is unconstitutional as per People v Villano, 369 Mich 428; 120 NW2d 204 (1963).

50. That by admission, neither Det. Lokuta nor the agents of DRANO on June 24th or July 15th notified the management of potential or actual misconduct by dancers renting the right to perform on Plaintiff's property.

51. That the implied or expressed understanding between the MLCC, Det. Lokuta and Plaintiff, was that if there was a violation occurring on the premises, Plaintiff's agents and employees would be notified and Plaintiff given an opportunity to correct, immediately, the prohibited act by removing the offending party.

52. That in the instant case, the Commission disregarded its own agreement, disregarded the interpretation given by Commissioner Laggis that lap dancing did not constitute

"simulated" sexual acts in violation of the rule and has failed to allege or establish that Plaintiff knew that the alleged rule violations were occurring.

WHEREFORE, Plaintiff prays for a declaratory judgment that scienter is a necessary element to be proved before Plaintiff's license may be revoked for alleged violations of MLCC Rule 436.1411 and that said Rule is void for vagueness and overbreadth.

COUNT II
VIOLATION OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS

53. That Plaintiff incorporates by reference paragraphs 1 through 52 of this Complaint as if fully set forth herein.
54. That an administrative agency is bound to follow its own rules and agreements.
55. That the as set forth above, the MLCC entered into an agreement with Plaintiff wherein it would give notification to Plaintiff if there was a violation of the MLCC rules occurring on Plaintiffs's property and did not give such notice until it issued a formal violation six to seven months after the fact.
56. That MLCC required Plaintiff to keep a list of dancers utilizing Plaintiff's premises under their stage name, real name, address and birth date. In accordance with this agreement Plaintiff submitted a form to the MLCC and Det. Lokuta, which form was approved.
57. That the MLCC and its agent, Det. Lokuta, knew that the dancers appeared under stage names and that without prompt notice it would be impossible for Plaintiff to locate or identify the dancers in question so that they might testify at any violation hearing and so that they might be removed from the premises, if they were violating the rules.

58. That Plaintiff was not required to keep the identification cards for an extended period of time and with the extensive turnover of dancers renting the right to utilize the premises.

59. That contrary to the agreement between the MLCC, Commissioner Laggis, Plaintiff, and the various participants, Det. Lokuta and the MLCC did not give Plaintiff notice until January of 1993, and did not seek the identification cards until November 1992, four (4) to five (5) months after the alleged events.

60. That the Commission when it rendered its initial findings, dated the findings in June but did not mail the findings by proper address and postage until 49 days after the Administrative Law Judge had rendered his Opinion. MLCC Rule 436.1909 states that "an Order shall be mailed to the licensee and the licensee attorney of record within 45 days after completion of the hearing." Licensee did not receive a copy of the findings within 45 days, and licensee's attorney did not receive the findings within 45 days.

61. That the MLCC claims that the findings were mailed to licensee by certified mail, however, an examination of the MLCC file reveals no green return receipt. Further, the MLCC states that it mailed to counsel, Terri Morency, the findings within 45 days but mailed such findings to the wrong address and the findings were returned, although the MLCC had on file counsel's proper and correct mailing address.

62. That under MLCC rulings, failure to properly submit the Opinions within the time required, requires dismissal and the MLCC has not dismissed.

63. That as set forth above, the hearings were begun by Commissioner Laggis but adjourned after testimony had begun. On May 18 and 19, 1994, Thomas A. Van Tiem replaced Laggis, although Laggis was available, without consent of Plaintiff and exhibited bias and prejudice toward Plaintiff during the hearings.

64. That following the hearings in May, 1994, Van Tiem issued Opinions on all alleged violations although he was not present for the testimony on allegations 2-1820, 2-1553, and 2-1556, as examples, and did not have the opportunity to view the witnesses. Again, Laggis was available to write his own Opinions or conclude the hearings.

65. That the conduct of the Commission violates fundamental administrative due process and borders on "star chamber" proceedings.

66. That the harassment techniques initiated by Lokuta in 1992 have continued with periodic raids, without warrant on Plaintiff's property allegedly conducting MLCC investigations such as checking patron identification. Within the past two (2) weeks, the end of September or the first of October, 1994, the entire City of Southgate police department raided Plaintiff's business establishment, leaving no police officers to perform any other functions, to check age identification of patrons, regardless of the age of patron, i.e. over 60, with the resultant effect of shutting Plaintiff's business operation for a period of time and causing patrons to leave the premises.

67. That during the initial hearings before Commissioners Laggis and then Van Tiem, the MLCC did not produce the complainant, Detective Lokuta, for testimony and the violation reports were prepared by Lokuta.

68. That the MLCC, prior to the hearings, did not furnish Plaintiff with the names, addresses, or identification of the alleged offenders of MLCC rule 436.1411, the dancers, although such information would have been available had it been sought timely by Det. Lokuta or the MLCC.

69. That the delay in notification of the violation was contrary to the agreement and contrary to prompt notice as required by the Administrative Procedures Act and constitutes a violation of substantive and procedural due process.

70. That a totality of the circumstances as illustrated by the above, but not limited thereto, reveals a total lack of respect for Plaintiff's procedural and substantive due process rights and constitute a violation of the Administrative Procedures Act and Article 1 and Article 10 of the Michigan Constitution of 1963.

WHEREFORE, Plaintiff prays that the alleged violations against Plaintiff be struck on the grounds of procedural and substantive due process in violation of the Michigan and United States Constitutions.

COUNT III

UNDUE INFLUENCE AND PROCEDURAL DUE PROCESS

71. That Plaintiff incorporates by reference paragraphs 1 through 70 of this Complaint as if fully set forth herein.

72. That in the offices of the MLCC, the Attorney General's Office has an office.

73. That the Assistant Attorney Generals assigned to prosecute violations of the MLCC have daily contact with the Commissioners and their staff including ex parte communications.

74. That the Assistant Attorney General in the instant cases, Mr. Gadaleto, has acted in a supervisory capacity for the Commission as well as prosecuting attorney. He sets hearing dates and directs personnel at the MLCC, and then litigates cases before the MLCC.

75. That during the 1992 settlement negotiations, and prior thereto, an Assistant Attorney General, Rubin, acted in a manner inconsistent with the legal representation of the State of Michigan and the MLCC, i.e. instructing witness not to appear, which actions resulted in a complaint by Plaintiff to Attorney General Frank Kelley and a subsequent agreement that Assistant Attorney General Rubin would not participate in further proceedings involving Plaintiff.

76. That Plaintiff is informed and believes that this agreement was violated by Rubin, Gadaleto, and the MLCC.

77. That the involvement, relationship and proximity of the Attorney General with the Commission gives the appearance of undue influence, partiality, and denial of substantive and procedural due process.

WHEREFORE, Plaintiff prays that the association between the Attorney General's office and the Commission be deemed improper, at least in appearance, in violative of substantive and procedural due process.

COUNT IV

UNLAWFUL TAKING AND VINDICTIVE PROSECUTION

78. That Plaintiff incorporates by reference paragraphs 1 through 77 of this Complaint as if fully set forth herein.

79. That the actions of Det. Lokuta are retaliatory for the litigation by Plaintiff in the United States District Court

wherein Lokuta was found guilty of violating the civil rights of John Hamilton, secretary and stockholder of Plaintiff corporation.

80. That the actions of Lokuta, MLCC, and, Plaintiff is informed and believes, Assistant Attorney General Rubin, are an attempt to cause Plaintiff to lose its liquor license and deprive Plaintiff of its property without just compensation and due process, contrary to Article 10 §2 of the Michigan Constitution of 1963 and the Fifth Amendment of the United States Constitution.

81. That the actions of the Commission in violation of the Administrative Procedures Act, violation of its agreements and rules, and issuing opinions without the trier of fact hearing the proofs, exhibit an attempt by the MLCC to deprive Plaintiff of its liquor license without just compensation and due process, contrary to the aforementioned constitutional provisions.

82. That the Plaintiff does not seek compensation for these violations but asks this Court to enjoin the harassment and vindictive acts of Defendant and its supporting law enforcement agencies.

83. The use of DRANO by Det. Lokuta is contrary to the charter and agreement of DRANO and is a further example of an attempt to disregard the rule of law to subject Plaintiff to Lokuta and the MLCC's will.

WHEREFORE, Plaintiff prays that this Court: (1) issue an ex-parte temporary restraining order and schedule a hearing within ten (10) days; and (2) issue a preliminary injunction after hearing restraining the MLCC and its agent, the Southgate Police Department from further harassment of Plaintiff and enjoining further proceedings on the alleged violations until there has been a full and complete hearing on this Complaint for Declaratory Judgment.

COUNT V

PROMISSORY ESTOPPEL, MISREPRESENTATION AND ENTRAPMENT AND LACHES

84. That Plaintiff incorporates by reference paragraphs 1 through 83 of this Complaint as if fully set forth herein.

85. That at the time of the negotiated settlement in March, 1992, Commissioner Laggis led Plaintiff to believe that lap dancing was approved conduct and not in violation of MCL 436.1411.

86. That at the aforesaid time, it was the understanding between MLCC, Commissioner Laggis, Plaintiff and the Southgate Police Department, in particular Detective Lokuta, that Plaintiff would be promptly notified of violations, when they occurred, so that Plaintiff could take corrective action without placing its liquor license in jeopardy.

87. That the Commission and Lokuta ignored the agreement and violated their own rules or materially misrepresented to Plaintiff, upon which representation Plaintiff had a right and did rely, to its detriment.

88. That the MLCC, Detective Lokuta, and the Attorney General's Office misrepresented the agreements and understandings to Plaintiff, with an intent to entrap Plaintiff. The MLCC, Lokuta and others intended to entrap Plaintiff by leading Plaintiff to believe that "lap dancing" was permissible, and that if dancers were renting Plaintiff's facilities for the purpose of violating MLCC rules and regulations or for lewd and lascivious purposes, Plaintiff would be promptly informed.

89. That the breach of agreement by MLCC or material misrepresentations or attempt to entrap must be

governed by the doctrine of promissory estoppel and the MLCC may not proceed against Plaintiff on the current violations.

90. That further, the delay of five (5) or six (6) months in providing notice of the alleged violation, prejudiced Plaintiff's ability to defend against the allegations, produce witnesses or otherwise prepare and is barred by laches.

WHEREFORE, Plaintiff prays that this Honorable Court declare that the 1992 agreements between Plaintiff and the MLCC govern and the MLCC is barred by laches and estopped from proceeding against Plaintiff on the current violations. Further, Plaintiff prays that this Court specifically enforce the reporting requirements as to any future alleged violations and the agreement that "lap dancing" is not a violation of MLCC 436.1411.

COUNT VI
INJUNCTION

91. That Plaintiff incorporates by reference paragraphs 1 through 90 of this Complaint as if fully set forth herein.

92. That Plaintiff continues to be harassed by the Southgate Police Department and the MLCC and its agents with intrusions upon Plaintiff's real property without warrant.

93. That as stated above, an administrative agency may not determine constitutional issues, and further, an administrative agency may not determine issues of equity such as promissory estoppel.

94. That the Commission has ordered that Plaintiff's liquor license be revoked.

95. That MLCC reported to the news media that Plaintiff is closed for business and may not operate which results in Plaintiff's permanently losing patrons.

96. That Plaintiff would be entitled to a de novo hearing on the allegations, but could not present evidence as to the Constitutional issues, the relationship between the Attorney General's Office and the Commission, the vindictive nature of Lokuta, et al's actions, including the underlying civil rights complaint by Plaintiff and Hamilton in the United States District Court or any of the other issues presented above such as unlawful taking. Therefore, Plaintiff would be denied a fair and complete hearing and an appeal would be useless for failure to present a complete picture of the proceedings.

97. That the de novo hearing before the Commission is scheduled for November 17, 1994, in Lansing, Michigan. This date, when given, was a conflict for Plaintiff counsel, but the date directed and set by Gadaleto.

98. That the Attorney General's Office has indicated, through the testimony of Thomas Giachino, Assistant Attorney General, that there has been specific instructions involving this Plaintiff since 1991, to give no quarter, contrary to custom and practice in the industry and that Plaintiff is being treated without causal protection.

99. That under MCL 436.1 et seq.; MSA 18.971 et seq. the Commission can terminate Plaintiff's license and cause it to cease operation immediately and put it out of business.

100. That further, under the aforementioned statues, Plaintiff's right of appeal would be limited to an Application for Certiorari to the Circuit Court. There is no right of appeal. Plaintiff's property can be taken without recourse to a court.

101. That the Complaint in this case is verified and acts as an Affidavit and further attached hereto is a certification of

counsel that notice is not required under Dukesherer and Dickerson, although such notice was given to Assistant Attorney General David Gadaleto by phone, this date, as the administrative agency does not have jurisdiction to hear the constitutional and equitable issues involved.

102. That proceeding with the de novo hearing on November 17, 1994, would be counter productive, in violation of judicial economy, and would lead to erroneous and contradictory legal conclusions.

103. That the purpose of a preliminary injunction and temporary restraining order is to preserve the status quo so that upon final hearing the rights of the parties can be determined without injury to either party. Attorney General v Thomas Solvent Co., 146 Mich App 55; 380 NW2d 53 (1955).

104. That Plaintiff will be and has been irreparably harmed by the revocation of its license and concurrent news releases if a temporary restraining order and/or a preliminary injunction is not issued, without consideration of the constitutional issues and equitable issues set forth above by the permanent loss of business, damage to its reputation, requirement to discharge or lay off employees, through the State's use of unconstitutional procedures and an invalid and unconstitutional regulation as per Sterling Secret Service, Inc. v Department of State Police, 20 Mich App 502; 174 NW2d 298 (1969).

105. That Plaintiff has no legal recourse or remedy at law. The MLCC is immune from tort liability and therefore Plaintiff can not be compensated by money damages. Similarly, the individual Commissioners and Attorney General's Office are immune under a form of judicial or qualified immunity. The order revoking Plaintiff's liquor license can be effectuated at any time and Plaintiff could not be compensated by monetary damages because of

the aforesaid immunity and continued interference with Plaintiff's business also can not be compensated or corrected. These injuries are immediate and irreparable and reoccurring.

106. That equity has had jurisdiction to enjoin public authorities from enforcing unconstitutional acts for nearly 3/4th of a century. See Devereaux v Genessee Tp. Board, 211 Mich 38; 177 NW 967 (1920).

WHEREFORE, Plaintiff prays that this Honorable Court grant a temporary restraining order and/or preliminary injunction enjoining the Commission from further harassment and enjoining the Commission from proceeding on November 17, 1994 with the de novo license revocation hearings pending final outcome of this declaratory judgment action.

Dated: _____ _____

John Hamilton, Secretary for
Plaintiff corporation

State of Michigan)
) ss
County of Wayne)

Subscribed and sworn to before me on this _____, 1994.

_____

_____
, Notary Public
Wayne County, Michigan
My Commission Expires:

Dated: _____ Respectfully submitted,

_____
Terri J. Morency (P40426)
Attorney for Plaintiff

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

JO-BET, INC 95- AS
d/b/a HENRY THE EIGHTH - SOUTH,
a Michigan corporation,
Plaintiff,

v

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendant.
_____/

Terri J. Morency (P40726)
Attorney for Jo-Bet, Inc.
8103 Middlebelt Rd.
Westland, MI, 48185
(313) 425-1189

A civil action between these parties arising out of the transaction or occurrence alleged in the Complaint has been previously filed in this Court, 94-433048 CZ and was assigned to Judge Lombard. That matter is still pending.

FIRST AMENDED COMPLAINT FOR SUPERINTENDING CONTROL

Plaintiff, JO-BET, INC., d/b/a HENRY THE EIGHTH-SOUTH, a Michigan corporation, (hereinafter, "Plaintiff") by and through its attorney, Terri J. Morency, for its First Amended Complaint for a Writ of Superintending Control states as follows:

1. That Plaintiff is a Michigan corporation with its principal place of business in the City of Southgate, State of Michigan.

2. That Plaintiff is licensed by the Michigan Liquor Control Commission (hereinafter MLCC) with a Class C liquor license issued by the State of Michigan.
3. The Michigan Liquor Control Commission (hereinafter "MLCC") is an agency of the State of Michigan under the direction and control of the Department of Commerce with its primary offices in Lansing, Michigan.
4. Jurisdiction and venue are found pursuant to MCLA 436.20, and MCR 3.302.
5. That on or about October 24, 1985, Plaintiff received a liquor license from the State of Michigan to operate a bar at 15480 Dix, Southgate, Michigan.
6. That in addition to the liquor license, Plaintiff also obtained, in 1985, an entertainment license that permits dancing, entertainers, and theatrical performances to occur on the premises.
7. That from 1985 to 1991, Plaintiff was without violation by the MLCC.
8. That on or about May 10, 1991, and May 17, 1991, Southgate Detective Lieutenant Lawrence Lokuta caused law enforcement officers to charge Plaintiff with its first liquor violations.
9. That thereafter, in an effort to smooth relations with the MLCC and the City of Southgate, Det. Lt. Lawrence Lokuta, John Hamilton, on behalf of Plaintiff, and Attorney Terrance P. Conlin, entered into a series of discussions to resolve these violations in an amicable manner.
10. That Plaintiff rents to dancers the right to perform on Plaintiff's premises as independent contractors. In the course of a month, more than 100 different dancers may perform.
11. That the various dancers perform at Plaintiff's establishment and elsewhere under an alias. On any

given day there may be two, three, four or more girls performing under the same alias "Lori", "Angel", "or "Ruth".

12. That Lokuta, on behalf of City, objected to the rental of Plaintiff's facilities for dancers to perform under an alias. Lokuta stated that he could not identify the dancers under their alias or obtain accurate addresses. Therefore, if there was a dancer that acted in violation of MLCC rules or in violation of ordinance or statute, Lokuta could not make a subsequent arrest.

13. That on or about March 27, 1992, a settlement was negotiated with the MLCC and the City of Southgate through Lokuta with reference to Plaintiff's first alleged MLCC violations. It was agreed that Plaintiff would plead no contest to the complaints, a fine would be levied and Plaintiff would take corrective actions as to the means by which the dancers could be identified.

14. In accordance with the negotiated settlement, a form was prepared and approved by the City of Southgate and Defendant Commission wherein each dancer, performing on any given day at any given time would complete a form listing the alias under which the performer was dancing at that time together with the dancer's address. In addition, the form expressly stated conduct which would be prohibited by the dancers. In other words, the form expressly stated that the dancer could not perform conduct in violation of MLCC rules. However, from the discussions with Commissioner Laggis, and Lokuta, "lap-dancing" would not be, per se, a prohibited activity.

15. That implicit or expressed in the agreement between Plaintiff, City of Southgate and MLCC constituting the negotiated settlement, was an agreement that violations by independent contractors renting use of

Plaintiff's property of the MLCC rules would be immediately reported to Plaintiff's agents and employees and Plaintiff's agents and employees would immediately terminate the right of a dancer to perform in its establishment.

16. That on or about June 24, 1992, a few days after the negotiated settlement and completion of the forms mandated by the settlement, Lokuta enlisted the assistance of Michigan State Police Narcotics Unit known as "DRANO", Downriver Area Narcotics Organization, to assist in the institution of a "sting operation" to encourage and entice dancers renting Plaintiff's property to purportedly violate MLCC rules.

17. That on or about July 15, 1992, Det. Lokuta together with the same officers and a "surveillance crew" again entered Plaintiff's premises to engage dancers for the purpose of enticing the dancers to violate MLCC rules.

18. That contrary to the expressed or implied agreement between the MLCC, City of Southgate and Plaintiff, on or about March 27, 1992, neither Lokuta nor any of the officers associated with him nor anyone from the City of Southgate or MLCC on June 24, 1992, or July 15, 1992, advised Plaintiff, its agents, or employees that there was a violation or potential violation of MLCC rules occurring on the premises so that Plaintiff could take corrective action. The very reasons that Lokuta wanted identification cards maintained, determination of the real name and address of the dancer, were violated by failure to notify Plaintiff or to obtain the actual names of the dancers at the time of the alleged violations from Plaintiff's identification cards.

19. That on or about November 12, 1992, Lokuta

directed two Southgate police officers, Anthony Kibin and Paul Sadowski to enter Plaintiff's establishment, contact the manager and ask to see the dancers' forms as per the agreement in March, 1992.

20. That the officers were given by the manager numerous "3 x 5 cards". The 3 x 5 cards contained stage names, phone numbers and addresses plus an accordion file with the approved forms.

21. That the Southgate officers did not inform Plaintiff, its agents, or employees that there had been any prior alleged violations of the MLCC rules, but were supplied the materials as per the agreement as to the dancers' names and addresses on the given day. Records more than 30 days old were not required to be maintained.

22. That Lokuta and the MLCC took no action until mid-January, 1993, six to seven months after the alleged event when they issued liquor violations against Plaintiff for the conduct of certain unidentified dancers. The complaint identified the dancers by alias such as a "Lori" or "Ruth", long after it was possible for Plaintiff to identify the correct individual and solicit or obtain the dancers' version of events.

23. That on or about September 14, 1993, hearings on the alleged violations were commenced before the Honorable Alex G. Laggis, Commissioner. The proceedings were subsequently adjourned without Laggis' timely opinion or extension, and resumed on May 18 and 19, 1994. This time, however, Administrative Law Judge Thomas A. Van Tiem, Sr. was conducting the hearings.

24. That prior to the commencement of the hearings, the City of Southgate, the Chief of Police of the Southgate Police Department, the Mayor and city

officials requested that the alleged violations be dismissed. However, the MLCC and the Attorney General's Office proceeded on their own, contrary to custom and procedure in the industry.

25. That on or about June, 1994, Judge Van Tiem issued opinions in all violations, dismissing three (3) and finding Plaintiff responsible for the remainder of the violations, including those hearings held by Alex Laggis for which Van Tiem was not present and ordered Plaintiff's liquor license to be revoked.

26. That Plaintiff, in July, 1994, timely petitioned the MLCC for a de novo hearing before the full Commission.

27. On January 4, 1995, the Commission denied the request for de novo hearing and affirmed the order of Commissioner Van Tiem. Plaintiff, pursuant to the aforementioned authority seeks superintending control.

COUNT I
UNCONSTITUTIONALITY OF STATUTE AND RULES

28. The Plaintiff incorporates by reference paragraphs 1-17 of this Petition as if fully set forth herein.

29. That MCL 436.20; MSA 18.991 pertaining to suspension or revocation of a license and, procedure hearing and appeal does not provide for automatic review by the Circuit Court for the county in which the licensee does business.

30. That Article VI §28 requires that all "judicial or quasi-judicial" findings, rulings, or orders affecting 'private rights or licenses' shall be subject to direct review by the courts."

31. That procedure established in MCL 436.20; MSA

18.991 violates Article VI §28 and is unconstitutional.

32. That as set forth above, Rule 436.1411 states: "An on-premiss licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio or cunnilingus."

33. That MLCC Rule 436.1411 does not define the term "simulate".

34. That Black's Law Dictionary defines simulate as: "To assume the mere appearance of, without the reality; to assume the signs or indications, falsely; to counterfeit; to feign; imitate; pretend."

35. That the MLCC, through Commissioner Laggis, at the time of the negotiated settlement in 1992, approved directly or by implication "lap dancing" as was taking place at Plaintiff's bar and similar establishments and for the purposes of enforcement of the Rule constituted lap dancing as not a "simulated" act and not in violation of MCR 436.1411.

37. That as set forth in State v Dizzy Duck, 203 Mich App 250; 511 NW2d 907 (1994), lap dancing was not, itself, lewd.

38. That the MLCC has approved various forms of "social dancing" which includes the tango and other popular dances that "simulate" sexual acts including "intercourse" and the MLCC does not enforce or prohibit such dancing.

39. That MLCC and the various law enforcement agencies do not enforce the regulation for hand motions that may be suggestive of masturbation by comedians or other entertainers, however such actions could, as written under the rule, constitute "simulated" masturbation.

40. That the rule is overly broad and void for vagueness or, alternatively, is being discriminatorily and subjectively enforced to the extent that it denies licensees equal protection under the law through the 14th Amendment of the United States Constitution and fails to inform the licensee of prohibited acts or conduct.

41. That while the MLCC Rule 436.1411 has been contested as to constitutionality regarding violations of freedom of speech and expression, the Statute has never been construed in terms of its definition and application. This is a case of first impression, Kotmar Ltd. v State of Michigan Liquor Control Commission, Docket No: 160062, notwithstanding. [A final decision in Kotmar by the Court of Appeals has not been rendered.]

WHEREFORE, Plaintiff prays that this Court hold MCL 436.20; MSA 18.991 unconstitutional as being in violation of Article VI §29 of the Michigan Constitution of 1963 and Rule 436.1411 unconstitutional as void for vagueness and a denial of equal protection.

COUNT II

VIOLATION OF MLCC RULE REQUIRES SCIENTER

42. The Plaintiff incorporates by reference paragraphs 1-41 of this Petition as if fully set forth herein.

43. That the MLCC and the rule as written ignores the requirement of scienter. By definition, scienter is "knowledge".

44. That MLCC Rule 436.1409 and MLCC Rule 436.1411 speak in terms of the licensee allowing certain conduct or actions. The word "allow" has not been legally defined in the State of Michigan. According to Black's Law Dictionary, 5th Edition, the word allow "has no rigid or precise meaning, its import varying according to the circumstances in

connection with which it is used."

45. That as used in the two aforementioned Rules, the word "allow" means consent. Consent requires knowledge or scienter. The Rule as applied by the MLCC subjects a licensee to punishment and revocation without knowledge or scienter and same is unconstitutional as per People v Villano, 369 Mich 428; 120 NW2d 204 (1963).

46. That the MLCC did not establish that Plaintiff had knowledge of the acts of the independent contractors or that a violation of MLCC rules and regulations had occurred.

WHEREFORE, Plaintiff prays that this Court that MLCC Rule 436.1409 and MLCC Rule 436.1411 be held unconstitutional for failure to require scienter as an element or alternatively that the alleged violations be dismissed for failure of the Commission to establish and prove by a preponderance of the evidence that Plaintiff knew or allowed MLCC violations to occur on its premises.

COUNT III

DUE PROCESS VIOLATIONS FOR FAILURE TO GIVE NOTICE ANDTIMELY PROSECUTE VIOLATIONS - ESTOPPEL AND LACHES

47. The Plaintiff incorporates by reference paragraphs 1-46 of this Petition as if fully set forth herein.

48. As set forth above, Plaintiff entered into an agreement with the MLCC and the City of Southgate wherein Plaintiff would obtain certain information and maintain records regarding the identity of independent contractors renting Plaintiff's premises for the purpose of dancing.

49. That as further set forth above, the MLCC and the City of Southgate knew that multiple independent contractors would be and were utilizing the same alias

and that delay in notification to Plaintiff of the name of an independent contractor allegedly violating MLCC rules would make it virtually impossible for Plaintiff, the City of Southgate or the MLCC to identify the alleged violator and to present that independent contractor as a witness at a violation hearing.

50. That the "sting operation" directed by Lokuta occurred in June and July of 1992. On the nights in question Plaintiff's premises were busy and there were available numerous potential witnesses to the alleged violations if they, in fact, occurred.

51. That as stated above, in November, Lokuta on behalf of the City of Southgate and the MLCC, directed two (2) officers to verify that Plaintiff was maintaining the identification cards and prohibition announcements agreed to in early 1992. However, the MLCC did not notify Plaintiff of the alleged misconduct until January 13, 1993, six (6) to seven (7) months after the alleged events and after it was possible for Plaintiff to locate either the independent contractors or the patrons present on the night in question.

52. That as a result of the delay in timely notification, Plaintiff was unable to interview the alleged offenders or secure witness testimony and the MLCC made no attempt to produce either the independent contractors or the patrons present on the night in question.

53. That MLCC and the City of Southgate intentionally failed to prosecute the alleged violations by petition or give timely notice so as to inhibit Plaintiff's ability to defend in violation of the 14th Amendment of the U.S. Constitution.

54. That by the agreement of early 1992 and background concerning that agreement, the MLCC is estopped and barred by laches from prosecuting Plaintiff on the

alleged violation for failure to timely give notice and prosecute same.

WHEREFORE, Plaintiff prays that this Court dismiss the alleged violations for want of due process, promissory estoppel and laches.

COUNT IV

DENIAL OF EQUAL PROTECTION - NO MATTER IN CONTROVERSY-FAILURE TO PRODUCE COMPLAINING WITNESS-FAILURE TO FOLLOW DEPARTMENTAL RULES AND REGULATIONS

55. The Plaintiff incorporates by reference paragraphs 1-54 of this Petition as if fully set forth herein.
56. That at all times mentioned herein, Detective Lokuta was the agent and employee of the City of Southgate, State of Michigan.
57. That Lokuta was the alleged complainant for the individual violations, although not present when the individual violations are said to have occurred.
58. That the City of Southgate, the Chief of Police of the Southgate Police Department, the Mayor and City officials requested that the alleged violations reported by Lokuta be withdrawn and dismissed.
59. That complainant Lokuta did not testify with reference to the alleged violations.
60. That as stated above, the hearings were begun by Commissioner Laggis, but the opinions as to three (3) violations were written by Van Tiem, although not present during such hearing and Laggis was available.
61. That MLCC rule requires the Commissioner to mail to the licensee and licensee's attorney findings of fact within 45 days after completion of the hearings, except upon written order of the Commission.

62. That the Commissioner, in fact, mailed the findings of fact to licensee's attorney at an improper address, and then re-mailed the findings to counsel 50 days after the hearing, instead of 45 days at no time to this date did the Commission mail the findings of fact to licensee.

63. That in prior hearings, the MLCC dismissed the violations where the mailings were improper under this rule, but refused to do so in this case, holding instead that the improper mailing to counsel was sufficient.

64. That the totality of the circumstances constitute a violation of the Administrative Procedure Act, the Michigan and United States Constitutions.

WHEREFORE, Plaintiff prays that this Honorable Court:

(1) Stay enforcement and execution pending final resolution;

(2) Require the MLCC to file a certified record;

(3) Vacate the Order of Revocation of Plaintiff's license; and

(4) Grant such other relief as is just and proper.

Dated: _____ Respectfully submitted,

Terri J. Morency (P40726)
Attorney for Plaintiff
8103 Middlebelt Rd.
Westland, MI, 48185
(313) 425-1189

STATE OF MICHIGAN CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

JO-BET, INC., d./b/a,
HENRY THE VIII SOUTH,
Petitioner

No. 95-501060-AS
Hon. Brian K. Zahra

v

MICHIGAN LIQUOR CONTROL COMMISSION,
Respondent.

Stephen H. Boak (P10912)
Attorney for Petitioner

Irene M. Mead (P31283)
Assistant Attorney General
Nancy A. Piggush (P28801)
Assistant Attorney General
Attorneys for Respondent
Michigan Liquor Control Commission
7150 Harris Dr., P.O. Box 30005
Lansing, MI 48909
(517) 322-1367

MOTION TO DISMISS PETITIONER'S APPEAL WITH PREJUDICE; OR TO SCHEDULE BRIEFING AND ARGUMENT IN SAID APPEAL

NOW COMES, Defendant-Respondent, Michigan Liquor Control Commission and pursuant to the Stipulation And Order Of Settlement entered August 4, 1995, (hereinafter referred to as "Settlement") and this Court's Order entered January 28, 1997, moves this Court for an Order dismissing Petitioner's appeal with prejudice or in the alternative to schedule briefing and oral argument of the appeal. The reasons and grounds for said motion are as follows:

1. This matter involves the Stipulation and Order of Settlement (hereafter "Settlement") entered into by the parties on August 4, 1995. A copy of the Settlement is attached hereto and made a part hereof and is set forth at Attachment 1 of this Motion.

2.Since the time of the entry of the Settlement the following facts and circumstances have occurred:

a. Petitioner's attempt to transfer its licenses and permits to another entity failed. See the Opinion and Order of Rashid, J. in the case of Jo-Bet, Inc., d/b/a Henry The VIII v City of South, No. 95-5333258-AW, (Wayne Circuit Court, Amended Order entered 9-30-36.) A copy of said Opinion and Order and Amended Order is set forth at Attachment 2 of this Motion; and see Jo-Bet, Inc. v City of Southgate,, Court of Appeals Docket No. 19870, entered 2-28-97. A copy of said Order is set forth at Attachment 3 of the Motion. Petitioner has not met the terms of the Settlement set forth at Paragraph (2)(A) and (B) of the parties' Stipulation.

b. Petitioner was cited for Liquor Control Commission Rules violations in a further Complaint for acts occurring on Petitioner's licensed premises on May 22, 1996. Petitioner was found responsible for said violations. A copy of the Decision and Order of Commissioner Seymour Podolsky is attached hereto and made a part hereof under Attachment 4 of this Motion. Petitioner has appealed the Order to the Commission's Appeal Board.

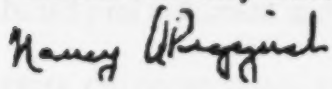
c.This Court denied Respondent's earlier Motion but permitted Respondent to renew its Motion on new or further facts. See thus Court's Order at Attachment 5 of this Motion.

3. Pursuant to the terms of the Settlement; especially Paragraph (2)(A) and (3), Defendant-Respondent will institute the revocation of Petitioner's licenses and permits unless this Court orders Petitioner's appeal be reinstated for briefing and oral argument.

WHEREFORE, Defendant-Respondent requests this Court enter an order dismissing Petitioner's appeal with prejudice pursuant to the terms of the Settlement; or, in the alternative, that this Court schedule times for the filing of Defendant-Respondent's Brief, Petitioner's Reply Brief and the date for oral argument of the appeal; and that this Court award any other and further relief it deems just and reasonable.

Respectfully submitted,
FRANK J. KELLEY
Attorney General

Irene M. Mead (P31283)
Assistant Attorney General



Nancy A. Piggush (P28801)
Assistant Attorney General
Attorney for Respondent
Michigan Liquor Control Commission
7150 Harris Dr., P.O. Box 30405
Lansing, MI 48909
(517) 322-1367

Dated: July 30,1997

STATE OF MICHIGAN
IN THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

JO-BET, INC., d/b/a,
HENRY THE VIII SOUTH,
Petitioner,

95-501060 AS 1/13/95
Judge: Brian K. Zahra

v.

MICHIGAN LIQUOR CONTROL
COMMISSION,

Respondent.

_____/

Stephen H. Boak (P10912)
Attorney for Petitioner

_____/

Thomas J. Emery (P22876)
Assistant Attorney General

Nancy A. Piggush (P2&801)
Assistant Attorney General
Attorneys for Respondent
Michigan Liquor Control Commission
7150 Harris Dr., P.O. Box 30005
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(517) 322-1367

ORDER DENYING DEFENDANTS MOTION FOR RELIEF FROM ORDER ENTERED IN CASE NO. 95-501060 AS AND TO SCHEDULE BRIEFING AND ARGUMENT OF PETITIONER'S APPEAL

JAN 28 1997 BRIAN K. ZAHRA

This cause having come on to be heard upon Defendant, Michigan Liquor Control Commission's Motion for Relief From Order Entered In Case No. 95-501060-AS, And To Schedule Briefing And Argument Of Petitioner's Appeal, this
Court having reviewed the Petitioners Response and the respective memoranda of law of each of the parties, having heard oral argument and being advised in the premises;

IT IS ORDERED that Defendant's Motion is hereby denied.

IT IS FURTHER ORDERED that Defendant may renew the motion at a later time upon showing other or additional reasons, facts, or circumstances warranting relief sought.

BRIAN K. ZAHRA
Hon. Brian K. Zahra

Approved As To Form:
_____/s_____
Stephen H. Boak (P10912)
Attorney for Petitioner, Jo-Bet, Inc.

Nancy A. Piggush (P28801)
Assistant Attorney General
Attorneys for Respondent, MLCC

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

JO-BET, INC.,
d/b/a, HENRY THE VIII SOUTH,
Petitioner, 95-501060 AS 1/13/95
JDG: BRIAN K. ZAHRA
v JO BET T INC
VS
MICHIGAN LIQUOR CONTROL
MICHIGAN LIQUOR CONTROL COMMISSION,
Respondent. /

Terri J. Morency (P40726)
Attorney for Petitioner
Thomas J. Giachino (P13948)
Assistant Attorney General

Nancy A- Piggush (P28801)
Assistant Attorney General
Attorneys for Respondent
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7150 Harris Dr., P.O. Box 30005
Lansing, MI 48909
(517) 322-1367

MOTION FOR RELIEF FROM ORDER ENTERED IN CASE NO. 95-501060-AS AND TO SCHEDULE BRIEFING AND ARGUMENT OF PETITIONER'S APPEAL

NOW COMES, Respondent, Michigan Liquor Control Commission, (hereinafter MLCC), by its attorneys Frank J. Kelley, by Assistant Attorneys General Thomas J. Giachino and Nancy A. Piggush and pursuant to MCR 2.612(C)(1)(d)(e) and/or (f) and MCR 7.105, moves the Court for entry of an Order reinstating said cause and scheduling briefing and argument in said cause. The reasons and rounds for this motion are:

1. The matter is an appeal from a final administrative agency license revocation order.

2. Petitioner filed its brief on appeal on June 15, 1995.

3. Respondent did not file a brief in response for the reason that this Court, by order, approved the parties' stipulation of settlement. Said Stipulation and Order of Settlement is attached hereto as Exhibit A

4. The parties' Settlement Agreement cannot be implemented due to the unfavorable ruling by Circuit Court Judge, James J. Rashid, wherein it was determined the local community had a right to deny an entertainment permit to be transferred with the license. A copy of Judge Rashid's decision is attached hereto as Exhibit B.

5. Petitioner's inability to obtain local community approval for the entertainment permit so it could transfer the entertainment permit with the license causes the parties' settlement, respecting Case No. 95-501060-AS, Exhibit A, to be null and void. Thus, it is necessary that this appeal matter proceed to judicial review of the Commission's licensing order revoking Petitioner's license.

WHEREFORE Respondent, respectfully, requests this Court enter an order:

A. Reinstating Case No. 95-501060-AS by setting aside the present order respecting that case number;

B. Requiring Respondent to file its brief within twenty-eight (28) days after receipt of this Court's Order;

C. Requiring Petitioner to file any reply brief within fourteen (14) days from date of service of Respondent's brief;

D. Setting a date for oral argument within fourteen (14) days after the filing of the reply brief or, if none is filed, that this Court set the date within fourteen (14) days from the filing of Respondent's brief.

Respectfully submitted,
FRANK J. KELLEY
Attorney General

Thomas J. Giachino (P13948)
Assistant Attorney General

Nancy A. Piggush (P28801)
Assistant Attorney General
Michigan Liquor Control Commission
7150 Harris Dr., P.O. Box 30005
Lansing, MI 48909
(517) 322-1367

Dated: October 10, 1996

motion for relief/jo-bet/9500225

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

JO-BET, INC., d/b/a,
HENRY THE VIII SOUTH, 95-501060 as 1/13/95
Petitioner, JDG: BRIAN K-. ZAHRA
JO BET INC.
VS VS.
MICHIGAN LIQUOR
CONTROL COMMISSION

MICHIGAN LIQUOR CONTROL COMMISSION,
Respondent.
_____/

Terri J. Morency (P40726)
Attorney for Petitioner
Thomas J. Giachino (P13948)
Assistant Attorney General

Nancy A. Piggush (P28801)
Assistant Attorney General
Attorneys for Respondent
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MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM ORDER ENTERED IN CASE NO. 95-501060-AS AND TO SCHEDULE BRIEFING AND ARGUMENT OF PETITIONER'S APPEAL

FACTS

On January 4, 1995, the Appeal Board of the Michigan Liquor Control Commission affirmed a number of orders entered on June 10, 1994, by Administrative Law Judge (ALJ), Thomas A. Van Tiem, Sr. Each of the orders

found the Petitioner responsible for one or more violations of 1979 AC R 346.1411 (1) by allowing on the licensed, persons who simulated performance of sexual intercourse or masturbation and/or for violations of 1979 AC R 436.1409(1) by allowing on the licenced premises, persons who exposed to public view their pubic region, anus or genitals. In each of the orders ALJ Van Tiem revoked Petitioner's liquor licenses and permits.

About January 12, 1995, Petitioner filed its Complaint for Superintending Control and Petition for review along with a Motion for Stay of Enforcement of the Commission's Appeal Board Order. On January 24, 1995, this Court entered an order staying enforcement of ALJ Van Tiem's orders as affirmed by the Commissions's Appeal Board Order. Petitioner filed its Amended Complaint for Superintending Control on April 21, 1995.

Petitioner filed its brief on appeal. Respondent did not filed its brief due to the parties having entered into a stipulation ans settlement. See Paragraph (2)(A) and (3) of Exhibit A. Petitioner attempted to effect the transfer but was unable to do so by an order entered by Judge James J. Rashid. In order Judge Rashid ruled that the City of Southgate did have the right to deny approval of transfer of Petitioner's entertainment permit. Judge Rashid's order has now left the order in this instant case devoid of the effect the parties sought.

For this matter to be properly disposed and brought to conclusion, it is necessary that the parties believed from the present order and that the case be restored to the Court's docket for the disposition on appeal. It is necessary that the Respondent's brief e filed, that Petitioner have and opportunity to submit a reply brief, if it desires to do so, and that a time for oral argument be set before this Court.

LEGAL ARGUMENT

The pertinent provisions of MCR 2.612(C) are as follows:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

* * *

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

The order now entered in this cause should not stand as the prospective order. The parties' stipulated settlement agreement with the order contemplated that the Petitioner would transfer its liquor licenses and permits. Due to the order entered by judge Rashid the entertainment permit cannot be transferred. Thus, the order in this instance cause cannot be effected. Relief from this order will allow the parties to continue the appeal matter to a final resolution.

The present circumstances of the case, when viewed with judge Rashid's order, have left the order in this case as one whose prospective application is inequitable. See MCR 2.612(C)(1)(e).

Additionally, MCR 2.612(C)(1)(f) allows this Court to relieve the parties from the existing order "for any other reason justifying relief." In the case of Tomblinson v Tomblinson,. 183 Mich App 592, 594-595; 455 NW2d 346 (1990) the Court of Appeals stated:

> This Court has held that MCR 2.612(C)(1)(f) will be applied only where the substantial rights of the opposing party are not detrimentally affected and where extraordinary circumstances exist. Mikedis v Perfection Heat Treating Co, 180 Mich App 189, 198; 446 NW2d 648 (1989); Zeer, supra, p 625. Further, a trial court's decision concerning subrule (f) is discretionary and will not be disturbed on appeal absent a clear showing of an abuse of discretion. Mikedis, supra, p 198.

In this case the substantial rights of the parties are not detrimentally affected. Each party's rights of appeal of the matter at issue are protected. In this case also the order of judge Rashid has brought about an extraordinary circumstance, a circumstance which makes the present order in this case ineffective. The present order fails to carry out the parties' intentions. If the parties are not relieved of the present order, they are unable to progress forward to final disposition of the Petitioner's appeal of the Michigan Liquor Control Commission's order of revocation of Petitioner's liquor licenses. Both equity and the practical need for final resolution of a matter requires that the present order in this case be set aside and the case be restored to this Court's docket for briefing, oral argument and final disposition of the appeal matter in this Court under the contested case method of appeal set forth in MCR 7.105.

Respectfully submitted,
FRANK J. KELLEY
Attorney General

Thomas J. Giachino (P13948)
Assistant Attorney General
Nancy A. Piggush
Nancy A. Piggush (P28801)
Assistant Attonev General
Michigan Liquor Control Commission
7150 Harris Dr., P.O. Box 30005
Lansing, MI 48909
(517) 322-1367

Date: October10, 1996

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JOBET, INC,
a Michigan corporation,
d/b/a HENRY VIII, SOUTH,
Petitioner,

DOCKET NO: 95-501060 AS
Judge Brian K. Zahra

v.

MICHIGAN LIQUOR CONTROL COMMISSION,
Respondent..

/

SEMPLINER, THOMAS & BOAK Attorneys for Petitioner By: Stephen H. Boak, (P10912) 711 W. Ann Arbor Trail Plymouth, MI 48170 (313) 455-4560	Nancy A. Piggush (P28801) Assistant Attorneys General Michigan Liquor Control Commission 7150 Harris Dr. PO BOX 30005 Lansing MI 48909 (517) 322-1367

/

AFFIDAVIT OF TERRI MORENCY

NOW COMES Affiant, Terri Morency, being first duly sworn, deposes and says:

1. That she is and at all times mentioned herein, was a licensed member or the Bar of Michigan, P40726.
2. That on or about August 4, 1995, Affiant was attorney for Jo-Bet, Inc. in the above entitled matter.
3. That Affiant, on behalf of Petitioner, Jo-Bet, Inc., negotiated a settlement of the above entitled matter with Assistant Attorney General Thomas Giachino,

representing the Michigan Liquor Control Commission. [MLCC]

4. That at the time of the settlement negotiations, the stock holders of Jo-Bet, Inc., had a prospective purchaser for the corporation including assets, license and permits, who were acceptable purchasers to the MLCC. It was contemplated by the parties that sale of the corporation would benefit both the MLCC and the stock holders of Jo-Bet, Inc. The MLCC would receive $20,000.00 and the litigation would be resolved. In exchange for Jo-Bet dismissing its Complaint for Superintending Control without prejudice, the order of revocation would be withdrawn and remanded to the Commission for an expedited sale. It was contemplated by both parties that sale would certainly occur within 90-150 days.

5. That to the surprise and amazement of Jo-Bet, Inc., the City of Southgate approved the transfer of the liquor license but severed the permits from the license and refused to transfer same, effectively killing the sale anticipated by both parties.

6. That it was Affiant's understanding and she believes the understanding of all parties, that should the MLCC fail to transfer the license and permits due to no fault of Jo-Bet, Inc., or failure of Jo-Bet, Inc. to produce a qualified purchaser, then in that instance, the Stipulation and Order or August 4, 1995 would be vacated and the matter reinstated for

continuation of the Superintending Control and would direct the Court's attention to paragraph 3 of the Stipulation and Order.

7. That it was never the understanding of Affiant or her client, Jo-Bet, Inc., that should the sale of Jo-Bet, Inc. be denied because of refusal to transfer the entertainment permits, that Jo-Bet, Inc. would be denied the right to continue with its Complaint for Superintending Control and that dismissal would be with prejudice. The original stipulation offered by the MLCC did not provide for reinstatement should the transfer of Jo-Bet's license and permits not be approved and paragraph 3 providing that dismissal was without prejudice was to provide for the reinstatement should the sale fail to be approved.

Further your Affiant sayeth not.

/s/
Terri Morency

State of Michigan)
) ss
County of _____)

Subscribed and sworn to before me on this ___ day of _____, 1997.

/s/
, Notary Public
_____ County, Michigan
My Commission Expires:

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

JO-BET, INC., d/b/a
HENRY THE VIII SOUTH,
Petitioner,

v.

95-501060 AS 1/13/95
JDG: BRIAN K. ZAHRA
JO BET INC
VS
MICHIGAN LIQUOR CONTROL

MICHIGAN LIQUOR CONTROL COMMISSION
Respondent. /

No.95-501060-AS
Hon. Brian K. Zahra

Stephen H. Boak (P10912)
Attorney for Petitioner /

Irene M.. Mead (P31283)
Assistant Attorney General

Nancy A. Piggush (P28801)
Assistant Attorney General
Attorneys for Respondent
Michigan Liquor Control Commission
7150 Harris Dr. P.O. Box 30005
Lansing, MI 48909
(517) 322-1367 /

EMERGENCY MOTION FOR EXPARTE ORDER TO QUASH SUBPOENA AND MOTION FOR PERMANENT ORDER OF PROTECTION

NOW COMES Respondent, Michigan Liquor Control Commission, by and through its attorneys, Irene M. Mead and Nancy A. Piggush, Assistant Attorneys General and pursuant to MCR 2.302(C) moves the Court enter an ex-parte and permanent order quashing aa SUBPOENA to appear directed to Thomas J. Giachino and further directing that Petitioner, Jo-Bet, Inc. not be permitted to take the deposition of Thomas J. Giachino. Said motion is based upon the following reasons and grounds:

1. The cause in which Petitioner seeks to take a deposition has been dismissed pursuant to the Stipulation of Settlement entered into by the parties. A copy of the Stipulation of Settlement is attached hereto as Attachment 1.

2. The Notice of the taking of the deposition is completely unreasonable; said notice having been facsimiled to Respondent's counsel in Lansing on October 8, 1997 at 1:50p.m. for a deposition noticed in Detroit, Michigan on October 9, 1997 at 10:00 a.m. Upon information and belief Petitioner intends to use said deposition at a hearing to be held before this Court on October 10, 1997 at 9:00 a.m.

3. That Petitioner's attempt to take the deposition of Thomas J. Giachino is in support of its Motion for Relief from Order scheduled to be heard before this Court on October 10, 1997 and is deficient in that its is done for the purpose of and Petitioner will attempt to make use of it in violation of the requirements of MCR 2.119(C)(1).

4. That said notice of deposition has been filed as a means to annoy, oppress and unduly burden the Respondent.

5. Petitioner's attempt to take the deposition of Thomas J. Giachino and to use said deposition as support for its motion for Relief is an attempt to overreach the terms of the parties' Stipulation of Settlement entered on August 5, 1995.

6. To protect the rights of Respondent, Respondent is in need of an ex-parte order quashing the subpoena to appear which schedules a deposition of Thomas J. Giachino for October 9, 1997 at 10:00 a.m., in Detroit, Michigan.

WHEREFORE, Respondent requests this Court enter an exparte order quashing the subpoena served upon Thomas J. Giachino and that Petitioner be ordered to desist and refrain from taking the deposition of Thomas J. Giachino on October 9, 1997 at 10:00 a.m.; and that this Court order Petitioner to show cause why it should not be permanently denied the taking of the deposition of Thomas J. Giachino in this cause; and for any and further relief this Court deems just and reasonable.

Respectfully submitted,
FRANK J. KELLY
Attorney General

Irene M. Mead (P31283)
Assistant Attorney General

J. Courtney Smith (P33921)
Nancy A. Piggush (P28801)
Assistant Attorney General
Attorney for Respondent
Michigan Liquor Control Commission
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Lansing, MI 48909
(517) 322-1367

SUBSCRIBED AND SWORN to before me this 8th day of October, 1997.

Renee DiCristoaro
Notary Public, Wayne County, MI
Acting in Wayne County, MI
My Comm Expires: 7-4-00

Dated: October 8, 1997

SUPREME COURT
STATE OF MICHIGAN

JO-BET, INC., d/b/a HENRY THE VIII SOUTH,

Petitioner/Appellant,

v

MICHIGAN LIQUOR CONTROL COMMISSION,

Respondent/ Appellee.

Docket No: 117952
Court of Appeals Docket No: 225422
Lower Court No. 95-501060-AS

/

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/

MOTION FOR RECONSIDERATION AND, ALTERNATIVELY, IF DENIED, MOTION TO STAY ISSUANCE OF MANDATE PENDING APPLICATION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

NOW COMES Appellant, Jo-Bet, Inc., d/b/a Henry the VIII South, by and through its attorney, Patrick J. McQueeney with Riley, Roumell & Connolly as co-counsel, pursuant to MCR 7.313 and hereby moves this Honorable Court for Reconsideration of Appellant's Application for Leave to Appeal and, if after deliberation, this Court denies Reconsideration and Leave to Appeal or submission of this matter to the Court of Appeals for adjudication, Appellant moves for Stay of the Issuance of the Mandate Pending Petition for Certiorari to the United States Supreme Court and shows unto this Honorable Court as follows:

1. Attached hereto and incorporated by reference is a brief in support of these motions, setting forth the grounds upon which the motions are based and the relief required.
2. The issues posed in Appellant's Application for Leave are of Constitutional magnitude, contrary to the decisions of this Court and the United States Supreme Court and Appellant has been denied rudimentary due process.
3. The underlying facts involve a liquor license revocation, a quasi-criminal proceeding, wherein the Attorney General's Office made certain promises and agreements with Appellant and broke its promise. Further, the Office of the Attorney General breached its ethical and legal duty to this Court and Appellant of complete candor.
4. The Wayne County Circuit Court, at the request of the Attorney General, disregarded the confessed intent of the parties and unilaterally altered the Consent Judgment from dismissal without prejudice to dismissal with prejudice. At the time that the Circuit Court took this action it was without subject matter jurisdiction,

the matter having been dismissed and the unilateral alteration of the dismissal without prejudice constituted a taking without due process.

5. Appellant has not been afforded judicial review by any appellate court of this State. If, after deliberation, this Court determines that reconsideration and leave should not be granted or, in the alternative that this matter should not be remanded to the Court of Appeals for adjudication in lieu of granting leave, Appellant then asks that this Honorable Court stay the issuance of its mandate and return of the file to the Wayne County Circuit Court pending application for writ of certiorari with the United States Supreme Court pursuant to MCR 7.317.

WHEREFORE, for the reasons more fully set forth in the brief attached hereto and incorporated by reference, Appellant prays that this Honorable Court reconsider its Order of July 30, 2001 and grant Leave to Appeal or in the alternative remand this matter to the Court of Appeals for adjudication and, in the alternative, should reconsideration be denied, stay issuance of this Court's mandate and retain the file pending Appellant's Application for Writ of Certiorari to the United States Supreme Court.

Dated:_____ Respectfully Submitted,

_____

Patrick J. McQueeney (P45797)
Attorney for Petitioner

SUPREME COURT
STATE OF MICHIGAN

JO-BET, INC., d/b/a
HENRY THE VIII SOUTH,

Petitioner/Appellant,

v

MICHIGAN LIQUOR CONTROL
COMMISSION,

Respondent/ Appellee.

Docket No: 117952
Court of Appeals Docket No: 225422
Lower Court No. 95-501060-AS

/

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/

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND,ALTERNATIVELY, IF DENIED, MOTION TO STAY ISSUANCE OF MANDATE PENDING APPLICATION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

INTRODUCTION

The State of Michigan, through the Office of the Attorney General, entered into a contingent settlement agreement to resolve pending litigation with Appellant based on the sale and transfer of Appellant's business. As a result of this agreement, Appellant's Complaint for Superintending Control was dismissed without prejudice. The sale was not concluded. The State of Michigan, in writing, in a Motion for Relief from Order on October 10, 1996, admitted that it was the intent of the parties in the contingent settlement agreement that if the sale did not occur, the Order of Settlement would be vacated and litigation resumed where it had stopped or Appellant could file a new Petition for Superintending Control.

As stated, the complaint for superintending control had been dismissed without prejudice. Contrary to the agreement and intent of the parties, the Attorney General's Office moved the Circuit Court to amend the order of dismissal from dismissal without prejudice to dismissal with prejudice. The trial court was without authority to amend a consent judgment or stipulated order without consent of the parties and erred. The Office of the Attorney General was ethically and duty bound to inform the trial court of its error and, on appeal, was duty bound to admit the intent of the parties to this Court.

Appellant has been denied fundamental due process. Denial of appellate review, given the facts of this case and the Constitutional responsibilities of this Court, further denies Appellant due process. "The requirement of due process is

merely the embodiment of the idea of fair play." Dodge v Detroit Truss Co. 300 Mich 575;2 NW 2d 509 (1942). "Due process is the guarantee of rights essential to a fair hearing under the Federal Constitution." People v. Coates, 337 Mich 56;59 NW 2d 83 (1953). "Basic due process in all judicial and quasi-judicial proceedings requires deciding power not to seek to serve interests other than the voters, taxpayers, members of the general public, justice and due process." Barkey v. Mick, 11 Mich App 381;161 NW 2d 445 (1968).

STATEMENT OF FACTS

A detailed Statement of Facts is set forth in Appellant's Application for Leave to Appeal and will not be repeated here. To place this motion in context, however, a summary of those facts will be offered.

In an attempt to settle then pending litigation, on a Complaint for Superintending Control from a liquor license revocation by the Michigan Liquor Control Commission, the Office of the Attorney General and Appellant entered into a contingent settlement agreement [Consent Judgment] conditioned upon the sale of Appellant's business and transfer of its liquor license and permits. The sale was not completed and the license and permits were not transferred.

The Attorney General's Office, on October 10, 1996, file a motion in the Circuit Court to reopen the underlying litigation and advised the Circuit Court that the settlement agreement was "null and void." It was the understanding, agreement and promise of the Office of the Attorney General, that if the sale of Appellant's business did not occur, that the litigation would be reinstituted at the point that the Consent Judgment was entered or that Appellant could refile his Application for Superintending Control.

The initial request by the Office of the Attorney General was denied by the Wayne County Circuit Court as premature as the participants to the sale were litigating denial of sale as a going concern before another judge in the Wayne County

Circuit Court. On July 30, 1997, the Office of the Attorney General moved not to reopen the prior litigation but rather to dismiss Appellant's Complaint for Superintending Control with prejudice, contrary to the agreement of the parties, and contrary to its prior admission that the Consent Judgment was "null and void." At the time this motion was made, the file was closed and the complaint for superintending control had been dismissed without prejudice. There was no action pending for the Court to dismiss.

On September 12, 1997, the trial court reopened the file and modified the Stipulation and Order of Settlement of August 4, 1995, by amending paragraph 3 of the contingent stipulation. The trial court, unilaterally, without hearing to determine the intent of the parties, stated that if the parties intended to include the various permits, they should have specified that provision in the stipulation.

Appellant, in a Motion for Relief from Order, furnished the trial court with an Affidavit of Terri Morency, former attorney for Appellant. The affidavit speaks for itself, however, the pertinent portions of the affidavit are as follows:

6...then in that instance, then the Stipulation and Order of August 4, 1995 would be vacated and the matter reinstated for continuation of the Superintending Control and would direct the Court's attention to paragraph 3 of the Stipulation and Order.

7. That it was never the understanding of Affiant or her client, Jo-Bet, Inc., that should the sale of Jo-Bet, Inc. be denied because of refusal to transfer the entertainment permits, that Jo-Bet, Inc., would be denied the right to continue with its Complaint for Superintending Control and that dismissal would be with prejudice. The original stipulation offered by the MLCC did not provide for reinstatement should the transfer of Jo-Bet's license and permits not be approved and paragraph 3 providing that dismissal was <u>without</u> prejudice was to provide for the

reinstatement should the sale fail to be approved.

In addition to the Affidavit of Terri Morency, Appellant scheduled the deposition of former Assistant Attorney General Thomas Giachino in support of the motion. Mr. Giachino had negotiated the initial Stipulation and Order of Settlement. Assistant Attorney General Nancy Piggush, by ex parte motion, obtained an order blocking Mr. Giachino's deposition upon representation that the deposition would invade the Attorny General's file. The trial court, after hearing argument, assured Appellant that if an adverse ruling were to be made, the trial court would permit, before decision, the deposition of Mr. Giachino. The trial court did not keep this promise and Giachino's deposition was never taken. In lieu of Mr. Giachino's deposition, for the purposes of argument, an offer of proof was made, on the record, by Appellant's counsel. Appellant represented to the court that:

> Mr. Giachino would state under oath, that it was his understanding and agreement, on behalf of the MLCC, that because the sale to the prospective buyer contemplated in August, 1995, was not completed, because of action by the City of Southgate in refusing to approve transfer of the liquor license and/or permits to a qualified purchaser, that the Stipulation and Order was null and void, that the prior Order of Dismissal vacated and that Petitioner would proceed on his Complaint for Superintending Control. The trial court, on November 18, 1997, issued a written Opinion and Order changing the wording of paragraph 3 of the Stipulation and Order of Settlement, stating in pertinent part:

> > Conspicuously absent from the settlement agreement is any reference to the transfer of the entertainment permits.
> >
> > If the parties intended the agreement to be contingent upon transfer of the entertainment permits it should have expressly stated such a contingency.

Appellant filed a Claim of Appeal of Right which was dismissed and Appellant then filed an Application for Leave with the Court of Appeals, which was denied. Appellant then sought leave from this Court, which was denied.

ARGUMENT AND LAW

I. WHETHER THE ATTORNEY GENERAL WAS BOUND BY ITS AGREEMENT AND PROMISE TO APPELLANT THAT IF THE SALE OF APPELLANT'S BUSINESS DID NOT OCCUR AND THE LIQUOR LICENSE TRANSFERRED, THE UNDERLYING CASE WOULD BE REINSTATED OR APPELLANT ALLOWED TO REFILE AND WHETHER VIOLATION OF THIS PROMISE CONSTITUTES A DENIAL OF "DUE PROCESS"?

II. WHETHER THE OFFICE OF THE ATTORNEY GENERAL HAS A DUTY OF COMPLETE CANDOR WITH THE COURTS AND APPELLANT AND VIOLATED ITS ETHICAL RESPONSIBILITIES?

III. WHETHER A PARTY IS BOUND BY ITS ADMISSIONS?

In Dunn v. Colleran, 247 F 3d 450 (3rd Cir 2001), Circuit Judge Barry wrote:

> Our criminal justice system is bottomed on several unwavering principles. One of those principles was recognized long ago by Justice Sutherland when he stated that **a prosecuting**

> **attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all**; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. **But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.**
> Berger v. United States, 295 U.S. 78, 88-89 (1935), overruled on other grounds, Stir one v. United States, 361 U.S. 212 (1960). Justice Sutherland's words continue to guide us. (Emphasis added).

This case represents a clear violation of this principle.

The proceedings in which Appellant was engaged at the time of the settlement involved revocation of Appellant's liquor license, a proceeding that was quasi-criminal in nature. in re Forfeiture 53.00, 178 Mich App 480; 444 NW 2d 182 (1989). A proceeding is quasi-criminal in nature when the underlying "act is not of the nature of making it subject to criminal prosecution but for which a forfeiture or penalty may be imposed." Ballantine's Law Dictionary, 3rd Ed. (1969).

The Attorney General is the sworn minister of justice for the State of Michigan. Weller v People, 30 Mich 16 (1874). He or she is a quasi judicial officer. Meister v People, 31 Mich 99 (1875) The honesty and integrity of the State is at issue in this appeal. The Office of the Attorney General is the highest non-judicial legal officer of a state. Phyle v Duffy, 334 US 431 (1948). Mr. Giachino was the designee of the Attorney General with the same powers and authority. In re: Watson, 293 Mich 263; 291 NW 652 (1940).

In this case, Appellant, through counsel, entered into an agreement with a representative of the Office of the Attorney General. The object of the Stipulation was the settlement of the pending litigation by the sale of Jo-Bet to a third party. The Commission agreed to expedite "investigation and licensing transfer process." The Stipulation provided, in paragraph 3 as follows:

> That any settlement of these cases under the terms of this agreement is in the nature of a consent judgment freely entered into by all the parties **with no right of any further administrative relief, or any further judicial review, under the captioned pleadings in Case No. 94-433048-CZ and 95-501060-AS, but the parties stipulate that the subject cases will be dismissed without prejudice until the license transfer is completed**. (Emphasis added).

The license transfer never occurred.

In the Attorney General's Brief in Support of it's Motion for Relief from Order filed October 10, 1996, the Attorney General stated:

> **The order now entered in this cause should not stand as the prospective order. The parties' stipulated settlement agreement with the order contemplated that the Petitioner would transfer its liquor licenses and permits...Thus, the order in this instance cause cannot be effected.** Relief from this order will allow the parties to continue the appeal matter to a final resolution.
>
> **In this case the substantial rights of the parties are not detrimentally affected**. Each party's rights of appeal of the matter at issue are protected. In this case...a circumstance which makes the present order in this case ineffective. **The present order fails to carry out the parties' intentions.** If the parties are not relieved of the present order, they are unable to progress forward to final disposition... Both equity and the practical need for final resolution of a matter requires that the present order in this case be set aside and the case be restored to this Court's docket for briefing, oral argument and final disposition... (Emphasis added)

The Attorney General's Office, in the body of its Motion, stated that the Stipulation and Order of Settlement were "null and void."

The trial court denied the Motion for Relief as premature. After Mr. Giachino retired, the Attorney General's Office filed a Motion to Dismiss Petitioner's Complaint for Superintending Control on July 30, 1997. **At this time, Appellant's Complaint for Superintending Control was already dismissed under the August 4, 1995 Stipulation and Order of Settlement. There was no complaint for superintending control pending. There was no case in**

controversy for the Circuit Court to modify or dismiss.

The Office of the Attorney General had entered into a promise and agreement on behalf of the State of Michigan. As set forth in Connell v. Higgenbotham, 403 U.S. 207 (1971), Perry v. Sindermann, 408 U.S. 593 (1992) and Board of Regents v. Roth, 408 U.S. 564 (1972), a State is bound by its promises and an expressed or implied promise by the State carries with it a protected property interest protected by procedural due process. Appellant was not afforded this protection.

In Santobello v. New York, 404 U.S. 257 (1971), Mr. Justice Berger, speaking for the Court, held that in criminal cases [or quasi-criminal cases such as involved herein] a State is bound by its promise to the extent that a defendant may seek specific performance of a promise. Justice Douglas, in his concurring opinion, equated failure of a State to fulfill its promise to a "'deceptive contrivance' akin to those we condemned in Mooney v. Holohan, 294 U.S. 103, 112;55 S. Ct. 340,341;79 L Ed 791 and Napue v. Illinois, 306 U.S. 264;79 S. Ct. 1173; 3 L Ed 2d 1217." Mooney and Napue relate to government use of false testimony and half truths. In the opinion of Justice Douglas, failure of the State to fulfill a promise is the equivalent of false testimony by an Officer of the Court.

MRPC 3.3 states in pertinent part that: "A lawyer shall not knowingly fail to disclose a material fact to a tribunal when necessary...", or, "to fail to disclose to a tribunal controlling legal authority..." or "offer evidence that the lawyer knows to be false."

In in re Calcutt, 184 Mich App 749; 458 NW 2d 919 (1990), lv den. 442 Mich (1993) it was held that a lawyer's failure to disclose accurately and completely was unethical. In People v. Sinic, 603 NE 2d 97 (1994) the Illinois Supreme Court held that 3.3 of the Canons of Ethics imposes a duty upon attorneys, as Officers of the Court, to make full and frank

disclosure of all facts the Court ought to know. To this date, the Attorney General has not admitted the nature of its agreement to this Court.

Further, MRPC 3.3(d) states that it is unethical for a lawyer, in an ex parte proceeding, to fail to inform the tribunal of all the material facts known to the lawyer and to enable the tribunal to make an informed decision. In this case, when Mr. Giachino's deposition was scheduled, Assistant Attorney General Nancy Piggush went to the trial judge and obtained an order blocking Mr. Giachino's deposition on the false grounds that it would invade the Attorney General's file when the true purpose was to obtain Mr. Giachino's understanding of the agreement of August 4, 1995. This is an additional ethical violation.

When the Motion to Dismiss was filed, the Office of the Attorney General did not refer the court to its motion and brief of October 10, 1996, wherein it had admitted that the Settlement Order, dismissing Appellant's Superintending Control Complaint without prejudice was entered "in contemplation that Petitioner [Appellant] would transfer its liquor license and permits" and that the Order of Settlement "fails to carry out the parties' intentions." The Office of the Attorney General, in this Motion to Dismiss, ignored its stated agreement with Appellant and asked the trial court to perform a prohibited act. i.e. to wit: change the agreement between the parties and disregard their admitted intent.

This is prohibited conduct for a lawyer, it is malfeasance for a State Officer. Malfeasance is the doing evil, ill conduct, the commission of some act which is positively unlawful or the doing of an act which a person ought not to do at all **or the unjust performance of some act which the party had no right or which he had contracted not to do.** It includes any wrongful conduct that affects, interrupts or interferes with the performance of official duties. City of Hazel Park v. Potter, 169 Mich App 714, 426 NW 2d 789 (1988).

The Office of the Attorney General, from its own filings, knew that its Motion to Dismiss was contrary to its agreement with Appellant. The Office of the Attorney General was obligated to seek reinstatement of the litigation at the point where the Stipulation and Settlement Order were operated or to permit Appellant to file a new Complaint for Superintending Control. By its promise, the Office of the Attorney General could not change its mind and then seek to dismiss, contrary to the Stipulation and intent of the parties. Failure to disclose, or attempt to correct a judicial misunderstanding, was both unlawful, a violation of procedural due process and unethical, particularly by the Office of the Attorney General.

This Court, by denying leave or remanding this matter to the Court of Appeals in lieu of granting leave, is sanctioning the misconduct. This Court, by denying leave, is allowing the Office of the Attorney General to violate the Rules of Professional Conduct. Allegations of this nature can never be taken lightly. This Court has a Constitutional duty, under the 14th Amendment of the United States Constitution, to insure that this Appellant was treated fairly.

MRE 801(B)(2) defines admission by a party opponent. Admissions are statements made by or on behalf of a party to a suit in which they are offered which contradicts some position assumed by a party in that suit and are substitute evidence for the adverse party. Elliotte v. Lavier, 299 Mich 353;300 NW 116 (1941). The October 10, 1996 statements by the Office of the Attorney General regarding the intent of the parties is an admission. That admission contradicts the position taken by the Office of the Attorney General on July 30, 1997 and the position taken with this Court. A party is bound by representative admissions of counsel. Payton v. Nikkila 200 Mich App 250;503 NW 2d 728 (1993).

This Court favors settlement. Appellant and the MLCC entered into a settlement. The settlement was conditioned upon the transfer of the liquor license, which transfer never occurred

The Stipulation in Support of the Order of Settlement was clear that the underlying Complaint for Superintending Control was dismissed **"without prejudice"** until the transfer of the liquor license was complete. Despite the clear language of the Stipulation, despite the admitted intent of the Attorney General and the affidavit of Ms. Morency, Appellant is in jeopardy of losing its liquor license because this Court will not grant leave or remand this matter to the Court of Appeals in lieu of granting leave.

It is well settled that the right to appeal is statutory and not Constitutional. Slezenger v. Liquor Control Commission, 314 Mich 644;23 NW 2d 243 (1946). However, under Article 6, § 1, Michigan Constitution of 1963, the "judicial power of the state is vested exclusively in one court of justice which shall be divided into one Supreme Court..." Under Article 6, § 4, of the Michigan Constitution of 1963, this Court has "general superintending control over all courts." As an impartial body, this Court has a duty to protect the rights of Appellant to a fair and equitable application of the law. As the Supreme Court of the State of Michigan, this Court has a duty to insure that the State of Michigan fulfills its promises and to protect the integrity of Michigan courts. Denial of judicial review is a breach of these duties and under the 14th Amendment, in a quasi-criminal proceedings, is a violation of due process.

IV. WHETHER A CIRCUIT COURT JUDGE IS PROHIBITED FROM CONSTRUING A CONTRACT IN SUCH MANNER AS TO INTENTIONALLY DISREGARD THE INTENT OF THE PARTIES AND PROHIBITED, WITHOUT MUTUAL CONSENT OF THE PARTIES, FROM MODIFYING OR ALTERING A CONSENT JUDGMENT OR STIPULATED ORDER?

STANDARD OF REVIEW

Standard of Review for questions of law is de novo. Bieszck v. Avis Rent-a-Car-System, Inc., 224 Mich App 295;568 NW 2d 401 (1997). The Order of August 4, 1995 dismissed the Complaint for Superintending Control "without prejudice." Dismissal without prejudice leaves the party as if there had been no action instituted. Rubsam v. General Motors Corp., 281 Mich 691;275 NW 735 (1937); Northrup v. Jay 262 Mich 463;247 NW 717 (1933). There has been no adjudications on the merits in this case. A dismissal without prejudice is not considered to be an adjudication on the merits and therefore the tolling statute applies. Morson v. Dickinson, 217 Mich App 308;551 NW 2d 449 (1946).

It is the duty of the trial court to ascertain the intent of the parties construing an agreement and the duty of the court to perpetuate that intent. A promise must be interpreted in the sense in which the promisee knew or had reason to know the promiser understood. Redinger v. Standard Oil, 6 Mich App 74;148 NW 2d 225 (1967). In construing an agreement between parties, the primary rule of construction is to ascertain the intent of the parties. Kassin v. Arc-Mation, Inc. 94 Mich App 520;288 NW 2d 413 (1979).

In its October 10, 1996 Motion for Relief from Order, the MLCC, through the Office of the Attorney General, stated that the Order of Settlement "failed to carry out the parties' intentions." Further, it was admitted that the "parties' stipulated settlement agreement with the order contemplated that the petitioner would transfer its liquor license and permits..." This did not occur.

Terri Morency filed an affidavit in addition to the statement of the Attorney General, setting forth her understanding of the intent. Both parties agreed. Despite the clear intent of the parties, the trial court violated the primary rule of construction and violated the mandate of the courts of this State that the trial court must attempt to effectuate the intent of the parties from construing an agreement.

Carl Goodwin & Sons, Inc. v. Dep't of State Highways, 33 Mich App 567;190 NW 2d 574 (1971). In no small part, the trial court's error was caused by the misrepresentation of Ms. Piggush. Her zeal to punish Appellant overcame her duty as an Assistant Attorney General.

In addition, failing to effectuate the intent of the parties, the trial court lacked authority to modify the stipulated Order of Settlement. Trendel v. Solomon, 178 Mich App 365;443 NW 2d 509 (1989). A consent judgment is a product of an agreement between the parties and the judge merely approves such agreement. A consent judgment does not reflect the considered judgment of the Court. Sylvania Silica Co. V. Berlin Tp. 186 Mich App 73; 463 NW 2d 129 (1990).

Appellant has both the facts and the law. If this Court will not grant leave or remand to the Court of Appeals in lieu of granting leave, Appellant asks this Court delay its mandate, stay enforcement and allow Appellant opportunity to seek certiorari.

CONCLUSION

Leave to appeal must be granted or, in the alternative, this case should be remanded to the Court of Appeals for adjudication in lieu of granting leave to appeal. In the alternative, if after deliberation, this Court denies leave or remand, Appellant asks that this Court stay its mandate, stay enforcement and allow Appellant the opportunity to seek certiorari.

Dated:_____ Respectfully Submitted,

_____/s/_____
Patrick J. McQueeney (P45797)
Attorney for Petitioner

SUPREME COURT
STATE OF MICHIGAN

JO-BET, INC., d/b/a HENRY THE VIII SOUTH,

Petitioner/Appellant,

v

MICHIGAN LIQUOR CONTROL COMMISSION,

Respondent/ Appellee.

Docket No: 117952
Court of Appeals Docket No: 225422
Lower Court No. 95-501060-AS

/

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/

CLARIFICATION OF RELIEF REQUESTED IN APPELLANT'S MOTION FOR RECONSIDERATION AND, ALTERNATIVELY, IF DENIED, MOTION TO STAY ISSUANCE OF MANDATE PENDING APPLICATION FORCERTIORARI TO THE UNITED STATES SUPREME COURT

NOW COMES Appellant, Jo-Bet, Inc., d/b/a Henry the VIII South, by and through its attorney, Patrick J. McQueeney with Riley, Roumell & Connolly as co-counsel, pursuant to MCR 7.313 and for clarification of relief requested in Appellant's Motion for Reconsideration of Appellant's Application for Leave to Appeal and, if after deliberation, should this Court deny Reconsideration and Leave to Appeal or submission of this matter to the Court of Appeals for adjudication, Appellant requested a Stay of the Issuance of the Mandate Pending Petition for Certiorari to the United States Supreme Court. In Appellant's Brief, Appellant stated that if this Court did not grant leave or remand "Appellant asks this Court to stay its mandate, **stay enforcement** and allow Appellant the opportunity to seek certiorari." (Emphasis added).

In point of clarification of the relief requested, Appellant asks this Court to reconsider and grant leave or remand to the Court of Appeals in lieu of granting leave however, if this Court, after deliberation, concludes that it will not grant leave, Appellant, pursuant to United States Supreme Court Rule 23, asks this Court to stay its mandate, stay enforcement and allow Appellant opportunity to seek certiorari to the United States Supreme Court. If this Court denies reconsideration and will not stay its mandate and enforcement, Appellant requests that the Order not take effect for 15 days to allow Appellant to seek a stay in the United States Supreme Court.

Dated:_____ Respectfully Submitted,

_____/s/_____
Patrick J. McQueeney (P45797)
Attorney for Petitioner

SUPREME COURT
STATE OF MICHIGAN

JO-BET, INC., d/b/a HENRY THE VIII SOUTH,

Petitioner/Appellant,

v

MICHIGAN LIQUOR CONTROL COMMISSION,

Respondent/ Appellee.

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/

MOTION TO STAY ENFORCEMENT OF SUPREME COURT AND CIRCUIT COURT ORDER PENDING APPLICATION TO UNITED STATES SUPREME COURT

NOW COMES Appellant, Jo-Bet, Inc., by and through its attorneys, Patrick J. McQueeney and Riley, Roumell & Connolly, P.C., pursuant to MCR 7.313 and hereby moves this Honorable Court for Stay of Mandate and Enforcement of Trial Court Judgment Pending Application to the United States Supreme Court and shows unto this Honorable Court as follows:

1. On or about August 28, 2001, Appellant filed with this Court a motion entitled Motion for Reconsideration and, Alternatively, if Denied, Motion to Stay Issuance of Mandate Pending Application for Certiorari to the United States Supreme Court.
2. In addition, immediately after filing the Motion for Reconsideration, Appellant filed a Clarification of Relief Requested in Appellant's Motion for Reconsideration. In the Clarification, "Appellant asked this Court to stay its mandate, **stay enforcement** and allow Appellant the opportunity to seek certiorari."
3. Appellant further stated in the Clarification of Relief Requested:

> Appellant asks this Court to reconsider and grant leave or remand to the Court of Appeals in lieu of granting leave however, if this Court, after deliberation, concludes that it will not grant leave, Appellant, pursuant to United States Supreme Court Rule 23, asks this Court to stay its mandate, stay enforcement and allow Appellant opportunity to seek certiorari to the United States Supreme Court.

4. On or about November 30, 2001, this Court issued an Order Denying Appellant's Motion for Reconsideration. However, this Court did not address the request for stay of enforcement to allow Appellant to appeal to the United States Supreme Court.

5. Pursuant to United States Supreme Court Rule 23, a stay must be first sought and ruled upon by this Court before a stay may be sought in the Supreme Court.

6. The decision of this Court on November 30, 2001, does not address the issue and therefore, Appellant cannot seek stay in the Supreme Court, should this Court deny stay, without an expressed order of this Court.

7. Upon receipt of this Court's Order, the clerk of this Court was contacted and the clerk indicated that he would entertain this motion.

8. In this Court's decision of November 30, 2001, the Court denied reconsideration, concluding that "It does not appear that the order was entered erroneously." Appellant respectfully disagrees and indicated its intent, should the Court deny reconsideration, to seek review by the Supreme Court.

9. Certiorari will be granted or denied within the next 120 days. Denial of a stay, by this Court, will put Appellant out of business and the injury will be irreparable to Appellant if forced to close during the pendency of the Application for Certiorari and Certiorari is granted by the United States Supreme Court.

10. Weighing the potential harm to Appellant against the shortness of time, it would be manifestly

unjust to deny Appellant stay pending his Application to the United States Supreme Court.

WHEREFORE, Appellant prays that this Honorable Court Stay the Issuance of its Mandate and Stay Enforcement of the Trial Court's Order Pending Application for Certiorari to the United States Supreme Court.

Dated:_____ Respectfully Submitted,

_____/s/_____
Patrick J. McQueeney (P45797)
Attorney for Petitioner

Constitution of the United States

5th Amendment

Rights of persons charged with crimes; guaranty of life, liberty and property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; now shall private property be taken for public use, without just compensation.

14th Amendment

Citizenship rights not to be abridged by states.
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963

Article VI, § 4. General superintending control over courts; writs; appellate jurisdiction

Sec. 4. The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

Article VI, § 28. Administrative action, review

Sec. 28. All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

Rule 3.302. Superintending Control.

(A) Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.

(B) Policy concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (D)(2), and MCR 7.101(A)(2), and 7.304(A).

(C) Writs Superseded. A superintending control order replaces the writs of certiorari and prohibition and the writ of mandamus when directed to a lower court or tribunal.

(D) Jurisdiction.

(1) The Supreme Court, the court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts or tribunals. In this rule, the term "circuit court" includes the Recorder's Court of the city of Detroit as to superintending control actions of which that court has jurisdiction.

(2) When a appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

(E) Procedure for Superintending Control in Circuit Court.

(1) Complaint. A person seeking superintending control in the circuit court must file a complaint with the court. Only the plaintiff's name may appear in the title of the action (for example, In re Smith). The plaintiff must serve a copy of the complaint on the court or tribunal over which superintending control is sought. If the superintending control action arises out of a particular action, a copy of the complaint must also be served on each other party to the proceeding in that court or tribunal.

(2) Answer. Anyone served under subrule (E)(1) may file an answer within 21 days after the complaint is served.

(3) Issuance of Order; Dismissal.

(a) After the filing of a complaint and answer or, if no answer is filed, after expiration of the time for filing an answer, the court may

(i) issue an order to show cause why the order requested should not be issued,

(ii) issue the order requested, or

(iii) dismiss the complaint.

(b) If a need for immediate action is shown, the court may enter an order before an answer is filed.

(c) The court may require in an order to show cause that additional records and papers be filed.

(d) An order to show cause must specify the date for hearing the complaint.

Michigan Court Rules

Rule 7.203 Jurisdiction of the Court of Appeals

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, court of claims, and recorder's court, as defined in MCR 7.202(7), except a judgment or order of the circuit court or recorder's court

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;

(3) In a divorce or paternity action, a postjudgment order affecting the custody of a minor.

(4) An order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule.

(B) Appeal by Leave. The court may grant leave to appeal from:

(1) a judgment or order of the circuit court, court of claims, and recorder's court which is not a final judgment appealable of right;

(2) a final judgment entered by the circuit court or the recorder's court on appeal from any other court;

(3) a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court;

(4) any other judgment or order appealable to the Court of Appeals by law or rule;

(5) any judgment or order when an appeal of right could have been taken by was not timely filed.

(C) Extraordinary Writs, Original Actions and Enforcement Actions. The court may entertain an action for:

(1) superintending control over a lower court or a tribunal immediately below it arising out of an action or proceeding which, when concluded, would result in an order appealable to the Court of Appeals;

(2) mandamus against a state officer (See MCL 600.4401; MSA 27A.4401);

(3) habeas corpus (see MCL 600.4304; MSA 27A.4304);

(4) quo warranto involving a state office or officer;

(5) any original action required by law to be filed in the Court of Appeals or Supreme Court;

(6) any action to enforce a final order of an administrative tribunal or agency required by law to be filed in the Court of Appeals or Supreme Court.

(D) Other Appeals and Proceedings. The court has jurisdiction over any other appeal or action established by law.

(E) Appeals by Prosecution. Appeals by the prosecution in criminal cases are governed by MCL 770.12; MSA 28.1109, except as provided by MCL 770.3; MSA 28.1100.

(F) Dismissal.

(1) Except when a motion to dismiss has been filed, the chief judge or another designated judge may, acting alone, dismiss an appeal or original proceeding for lack of jurisdiction.

(2) The appellant or plaintiff may file a motion for reconsideration with 21 days after the date of the order of dismissal. The motion shall be submitted to a panel of 3 judges. No entry fee is required for a motion filed under this subrule.

(3) The clerk will not accept for filing a motion for rehearing of an order issued by a 3-judge panel that denies a motion for reconsideration filed under subrule (2).

Michigan Court Rules

Rule 7.301 Jurisdiction and Term

(A) Jurisdiction. The Supreme Court may:

(1) review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223-9.226);

(2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.302);

(3) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);

(4) give an advisory opinion (see Const 1963, art 3, s 8);

(5) respond to a certified question (see MCR 7.305);

(6) exercise superintending control over a lower court or tribunal (see, e.g., MCR 7.304);

(7) exercise other jurisdiction as provided by the constitution or by law.

(B) Term. The Court will hold an annual term beginning on October 1 and ending on September 30. At every term, the Court will announce a date after which it will not call cases for argument except pursuant to order on a showing of special cause. Except as provided in MCR 7.312(E), the end of a term has no effect on pending cases.

Rule 7.302 Application for Leave to Appeal

(A) What to File. To apply for leave to appeal, a party must file:

(1) 8 copies of an application for leave to appeal (one must be signed) consisting of the following:

(a) a statement identifying the judgment or order appealed from and indicating the relief sought;

(b) the questions presented for review related in concise terms to the facts of the case;

(c) a table of contents and index of authorities conforming to MCR 7.212(C)(2) and (3);

(d) a concise statement of the material proceedings and facts conforming to MCR 7.212(C)(5);

(e) a concise argument in support of the appellant's position on each of the stated questions;

(f) any opinion, findings, or judgment of the trial court relevant to the question as to which leave to appeal is sought;

(g) the opinion or order of the court of Appeals, unless review of a pending case is being sought;

(2) A notice for hearing stating that the application will be submitted to the Court on a date which is on a Tuesday at least 21 days after the filing of the application;

(3) Proof that a copy of the application was served on all other parties, the Court of Appeals clerk, and the trial court clerk; and

(4) The fee provided by MCR 7.319(B)(7)(a).

(B) Grounds. The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals, delay in final adjudication is likely to cause substantial harm;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

(C) When to File.

(1) *Before Court of Appeals Decision.* In an appeal before the Court of Appeals decision, the application must be filed within 28 days

(a) after a claim of appeal is filed in the Court of Appeals;

(b) after an application for leave to appeal is filed in the Court of Appeals; or

(c) after entry of an order by the Court of Appeals granting an application for leave to appeal.

(2) *Other Appeals.* Except as provided in subrule (C)(4), in other appeals the application must be filed within 21 days

(a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals;

(b) after the filing of the opinion appealed from; or

(c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

(3) *Later Application.* A delayed application may be filed, if it is accompanied by an affidavit explaining the delay. However, a delayed application may not be filed more than 56 days after the Court of Appeals decision.

(4) *Decisions Remanding for Further Proceedings.* If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave may be filed within 21 days after

(a) the court of Appeals decision ordering the remand, or

(b) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question.

(5) *Effect of Appeal on Decision Remanding Case.* If a party appeals a decision which remands for further proceedings as provided in subrule (C)(4)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E), a timely appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215(E), the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.

(6) *Orders Denying Motions To Remand.* If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal from the decision on the merits.

(D) Opposing Brief; Cross Appeal.

(1) Any party may file 8 copies of an opposing brief before the day the application is noticed for hearing. He or she must file proof that a copy of the brief was served on all other parties.

(2) An application for leave to appeal as cross appellant may be filed with the clerk by the date the appellant's application for leave is noticed for hearing or within 21 days after the appellant's application is filed, whichever is later. The application must comply with subrule (A).

(E) Emergencies. Any party may move for immediate consideration of a pending application by showing what injury would occur if usual procedures were followed. The motion or an accompanying affidavit must explain the manner of service of the motion on the other parties.

(F) Decision.

(1) *Possible Court Actions.* The Court may rant or deny the application, enter a final decision, or issue a peremptory order. There is no oral argument. The clerk shall issue the order entered and mail copies to the parties and to the Court of Appeals clerk.

(2) *Appeal Before Court of Appeals Decision.* If leave to appeal is granted, the appeal is thereafter pending in the Supreme Court only, and subchapter 7.300 applies.

(3) *Appeal After Court of Appeals Decision.* If leave to appeal is denied, the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms. If leave to appeal is granted, jurisdiction over the case is vested in the Supreme Court, and subchapter 7.300 applies.

(4) *Issues on Appeal.*

(a) Unless otherwise ordered by the Court, appeals shall be limited to the issues raised in the application for leave to appeal.

(b) On motion of any party, for good cause, the Court may grant a request to add additional issues not raised in the application for leave to appeal or in the order granting leave to appeal. Permission to brief and argue such additional issues does not extend the time for filing of briefs and appendixes.

(G) Stay of Proceedings. MCR 7.209 applies to appeals to the Supreme Court. When a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered, it operates to stay proceedings pending disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or Court of Appeals.

436.17, Sec. 17

* * * (1) N/A

* * * (2) N/A

Expiration; construction: death of licensee; transfer; local approval and revocation. (3) A full-year license issued by the commission shall expire on April 30 following the date of issuance or the date fixed by the commission. A license issued under this act shall be construed to be a contract between the commission and the licensee and shall be signed by both parties. When a licensee dies, the commission may approve the operation of the establishment by a personal representative or independent personal representative duly appointed by the proper court, pending the settlement of the estate of the deceased licensee. The commission may approve a receiver or trustee appointed by a proper court to operate the licensed establishment of a licensee of the commission. The commission may grant a part-year license for proportionate part of the license feel specified in section 19. In a resort area the commission shall grant a license for as short a period as 3 months. A license may be transferred with the consent of the commission. A class C or specially designated distributor license obtained other than by transfer shall not be transferred within 3 years after its issuance except if the licensee clearly and convincingly shows that unusual hardship will result if the transfer is not consented to by the commission. Except as provided in section 17b, an application for a license to sell beer and wine or spirits for consumption on the premises, except in a city having a population of 1,000,000 or more, shall be approved by the local legislative body in which the applicant's

place of business is located before the license is granted by the commission, except that in the case of an application for renewal of an existing license, if an objection to a renewal has not been filed with the commission by the local legislative body not less than 30 days before the date of expiration of the license, the approval of the local legislative body shall not be required. The commission shall provide the local legislative body and the local chief of police with the name, home and business addresses, and home and business phone numbers to accomplish the local legislative review of new and transferred license applications called for in this subsection. Upon request of the local legislative body after due notice and proper hearing by the local legislative body and the commission, the commission shall revoke the license of a licensee granted a license to sell beer, wine, or spirits for consumption on the premises, or the commission shall revoke any permit issued by the commission which is held in conjunction with a license to sell beer, wine, or spirits for consumption on the premises.

* * * (4) N/A

* * * (5) N/A

* * * (6) N/A

* * * (7) N/A

* * * (8) N/A

436.20 Liquor license; suspension or revocation; penalty. Sec. 20.

(1) The commission, and any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, upon due notice and proper hearing, shall have the right and power to suspend or revoke any license upon a violation of this act or any of the rules promulgated by the commission under this act. The commission, and any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, may assess a penalty of not more than $300.00 for each violation of this act, or rules promulgated under this act, in addition to or in lieu of revocation or suspension of the license, which penalty shall be paid to the commission and deposited with the state treasurer and shall be credited to the general fund of the state.

Procedure; hearing, appeal; defense; criminal prosecution, effect.

(2) The commission shall provide the procedure by which any licensee feeling aggrieved by any penalty imposed under subsection (1) and any suspension or revocation of a license ordered by the commission, a commissioner, or a duly authorized agent of the commission, may request a hearing for the purpose of presenting any facts or reasons to the commission why the penalty or the suspension or revocation should be modified or rescinded. Any such request shall be in writing and accompanied by a fee of $25.00. The commission after reviewing the record made before a commissioner or a duly authorized agent of the commission may allow or refuse to allow the hearing in accordance with the commission's rules. Such right, however, shall not be interpreted by any court as curtailing, removing, or annulling the right of the commission to suspend or revoke licenses as provided for in this act.

A licensee shall not have a right of appeal from the final determination of the commission, except by writ of certiorari to the circuit court. Notice of the order of suspension or revocation of a license or assessment of a penalty, or both, shall be given in the manner prescribed by the commission. The suspension or revocation of a license or assessment of a penalty, or both, by the commission, or a duly authorized agent of the commission, shall not prohibit the institution of criminal prosecutions for violations of this act. The institution of criminal prosecutions for violations of this act, or the acquittal or conviction of any person for a violation of this act, shall not prevent the suspension or revocation of a license or assessment of a penalty, or both, by the commission. In a hearing for the suspension or revocation of a license issued pursuant to this act, proof that the defendant licensee or an agent or employee of the licensee demanded and was shown, before furnishing any alcoholic liquor to a person less than 21 years of age, a motor vehicle operator's license, a registration certificate issued by the federal selective service, or other bona fide documentary evidence of majority and identity of the person, may be offered as evidence in a defense to a proceeding for the suspension or revocation of a license issued under this act.

Authorized hearing agents; number, designation.

(3) In addition to the hearing commissioners provided for in section 5, the chairperson of the commission may designate not more than 2 duly authorized agents to hear violations cases. A person appointed under this subsection shall be a member in good standing of the state bar of Michigan.

Authority.

(4) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall have the same authority and responsibility as does a hearing commissioner under this act and the rules promulgated pursuant to this act, in the hearing of violation cases.

Eligibility for reappointment.

(5) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall be ineligible for appointment to the commission for a period of 1 year after the person ceases to serve as a duly authorized agent.

CHAPTER 436 ALCOHOLIC BEVERAGES
436.1501 Liquor licenses

Sec. 501. (1) The commission may issue licenses as provided in this act upon the payment of the fees provided in section 525 and the filing of the bonds required in section 801 or liability insurance as provided in section 803. Beginning not later than July 1, 2002 and subject to section 906(2) and (3), the commission shall not issue a new on premises license or transfer more than 50% interest in an existing on premises license unless the applicant or transferee offers proof acceptable to the commission that he or she has employed or has present on the licensed premises, at a minimum, supervisory personnel on each shift and during all hours in which alcoholic liquor is served who have successfully completed a server training program as further described in section 906. The commission may consider an individual enrolled and actively participating in a server training program as having successfully completed the program for such time as the individual is participating. The commission may allow an applicant or a conditionally approved licensee at least 180 days, or more upon a showing of good cause, to meet the minimum personnel training requirements of this subsection. The commission may suspend the license of a conditionally approved licensee for failure to comply with this subsection. The commission may waive the server training requirements of this subsection on the basis of either of the following circumstances:

(a) The licensee's responsible operating experience or training.

(b) The person's demonstration of an acceptable level of responsible operation either as a licensee during the preceding 30 years or as a manager with substantial experience in serving alcoholic liquor.

(2) A full-year license issued by the commission shall expire on April 30 following the date of issuance or the date fixed by the commission. A license issued under this act shall be construed as a contract between the commission and the licensee and shall be signed by both parties. If a licensee dies, the commission may approve the operation of the establishment by a personal representative or independent personal representative duly appointed by a court of competent jurisdiction, pending the settlement of the estate of the deceased licensee. The commission may approve a receiver or trustee appointed by a court of competent jurisdiction to operate the licensed establishment of a licensee. The commission may grant a part-year license for a proportionate part of the license fee specified in section 525. In a resort area the commission shall grant a license for a period of time as short as 3 months. A license may be transferred with the consent of the commission. A class C or specially designated distributor license obtained in a manner other than by transfer shall not be transferred within 3 years after its issuance except under circumstances where the licensee clearly and convincingly demonstrates that unusual hardship will result if the transfer does not receive the consent of the commission. An application for a license to sell alcoholic liquor for consumption on the premises, except in a city having a population of 750,000 or more, shall be approved by the local legislative body in which the applicant's place of business is located before the license is granted by the commission, except that in the case of an application for renewal of an existing license, if an objection to a renewal has not been filed with the commission by the

local legislative body not less than 30 days before the date of expiration of the license, the approval of the local legislative body shall not be required. The commission shall provide the local legislative body and the local chief of police with the name, home and business addresses, and home and business phone numbers to accomplish the local legislative reviews of new and transferred license applications required by this subsection. Upon request of the local legislative body after due notice and proper hearing by
the local legislative body and the commission, the commission shall revoke the license of a licensee granted a license to sell alcoholic liquor for consumption on the premises or any permit held in conjunction with that license.

(3) A local legislative body, by resolution, may request that the commission revoke the license of a licensee granted a license to sell alcoholic liquor for consumption off the premises whose place of business is located within the local legislative body's jurisdiction and who has been determined pursuant to commission violation hearings to have sold or furnished alcoholic liquor, on at least 3 separate occasions in a single calendar year, to a person who is less than 21 years of age if those violations did not involve the use of falsified or fraudulent identification by the person who is less than 21 years of age. If the commission verifies that the licensee who is the subject of the resolution has been found to have committed the violations as prescribed in this subsection, the commission may suspend or revoke the licensee's license and any permit held in conjunction with that license.

(4) This act does not prohibit a hotel which is or was the holder of a license authorizing the retail sale of alcoholic liquor for consumption on the premises from applying for and receiving under this act any other and different type of license authorizing the retail sale of alcoholic liquor for consumption

on the premises, and the application for the license shall not be considered a new application for a license so long as the total number of public licenses for consumption on the premises does not exceed the authorized total established in this act and the sale of alcoholic liquor is approved by the electors. The commission may divide the state into 3 zones and establish for each zone an anniversary date for renewal of full-year retail licenses in the licensing year. The commission shall promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the effective administration of the renewal of licenses.

(5) The commission, with the written approval of the department of agriculture in the case of the Michigan state fairgrounds and the Upper Peninsula state fairgrounds, may issue without regard to the quota provision of section 531 a tavern license to a person as concessionaire leasing or renting a portion of either the Upper Peninsula state fairgrounds or the state fairgrounds, or both, to service the licensed area in use for recreational or exhibition purposes other than at the time of the annual Upper Peninsula state fair under section 2 of 1927 PA 89, MCL 285.142. A license issued under this subsection is not transferable.

History: 1998, Act 58, Imd. Eff. Apr. 14, 1998; Am. 1998, Act 416, Imd. Eff. Dec. 21, 1998; Am. 2000, Act 431, Imd. Eff. Jan. 9, 2001.

436.1903 Liquor control commission; licenses, revocation, suspension, penalty, procedure

Sec. 903. (1) The commission or any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, upon due notice and proper hearing, may suspend or revoke any license upon a violation of this act or any of the rules promulgated by the commission under this act. The commission or any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, may assess a penalty of not more than $300.00 for each violation of this act or rules promulgated under this act, or not more than $1,000.00 for each violation of section 801(2), in addition to or in lieu of revocation or suspension of the license, which penalty shall be paid to the commission and deposited with the state treasurer and shall be credited to the general fund of the state. The commission shall hold a hearing and order the suspension or revocation of a license if the licensee has been found liable for 3 or more separate violations of section 801(2) which violations occurred on different occasions within a 24-month period unless such violations for the sale, furnishing, or giving alcoholic liquor to a minor were discovered by the licensee and disclosed to an appropriate law enforcement agency immediately upon discovery.

(2) The commission shall provide a procedure by which a licensee who is aggrieved by any penalty imposed under subsection (1) and any suspension or revocation of a license ordered by the commission, a commissioner, or a duly authorized agent of the commission may request a hearing for the purpose of presenting any facts or reasons to the commission as to why the penalty, suspension, or revocation

should be modified or rescinded. Any such request shall be in writing and accompanied by a fee of $25.00. The commission, after reviewing the record made before a commissioner or a duly authorized agent of the commission, may allow or refuse to allow the hearing in accordance with the commission's rules. The right to a hearing provided in this subsection, however, shall not be interpreted by any court as curtailing, removing, or annulling the right of the commission to suspend or revoke licenses as provided for in this act. A licensee does not have a right of appeal from the final determination of the commission, except by leave of the circuit court. Notice of the order of suspension or revocation of a license or of the assessment of a penalty, or both, shall be given in the manner prescribed by the commission. The suspension or revocation of a license or the assessment of a penalty, or both, by the commission or a duly authorized agent of the commission does not prohibit the institution of a criminal prosecution for a violation of this act. The institution of a criminal prosecution for a violation of this act or the acquittal or conviction of a person for a violation of this act does not prevent the suspension or revocation of a license or the assessment of a penalty, or both, by the commission. In a hearing for the suspension or revocation of a license issued under this act, proof that the defendant licensee or an agent or employee of the licensee demanded and was shown, before furnishing any alcoholic liquor to a minor, a motor vehicle operator or chauffeur license or a registration certificate issued by the federal selective service, or other bona fide documentary evidence of majority and identity of the person, may be offered as evidence in a defense to a proceeding for the suspension or revocation of a license issued under this act. A licensee who has reason to believe that a minor has used fraudulent identification to purchase alcoholic liquor in violation of section 703 shall file a police report concerning the violation with a local law enforcement agency and shall also present the alleged fraudulent identification to the local law enforcement

agency at the time of filing the report if the identification is in the possession of the licensee. The commission may promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, regarding the utilization by licensees of equipment designed to detect altered or forged driver licenses, state identification cards, and other forms of identification.

(3) In addition to the hearing commissioners provided for in section 209, the chairperson of the commission may designate not more than 2 duly authorized agents to hear violation cases. A person appointed under this subsection shall be a member in good standing of the state bar of Michigan.

(4) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall have, in the hearing of violation cases, the same authority and responsibility as does a hearing commissioner under this act and the rules promulgated under this act.

(5) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall be ineligible for appointment to the commission for a period of 1 year after the person ceases to serve as a duly authorized agent.

History: 1998, Act 58, Imd. Eff. Apr. 14, 1998; Am. 1998, Act 416, Imd. Eff. Dec. 21, 1998; Am. 2000, Act 431, Imd. Eff. Jan. 9, 2001.

Michigan Liquor Control Commission, 1980 Annual Administrative Code Supplement

Rule 436.1411

Explicit sexual activity prohibited; applicability to electronic reproduction.

Rule 11 (1) An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus.

(2) anon-premise licensee shall not allow in or upon the licensed premises the showing of films, television, slides, or other electronic reproductions which depict scenes wherein a person performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus. This prohibition does not apply to any publicly broadcast television transmission from a federally licensed station.

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an exparte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer and that will enable the tribunal to make an informed decision, whether or not the facts are adverse.